Supreme Court, U.S.
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In the
Supreme Court of the United States

ISOLINA PICON, Petitioner,

v.

PETER A. BENSON,
COUNTY OF SAN MATEO,
ROBERT FOUCRAULT, et al.,
Respondents

On Petition For Writ of Certiorari
To The California Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Ayanna L. Jenkins Toney
Counsel of Record
Law Offices of Ayanna L.
Jenkins Toney
225 Bush Street, 16th Floor
San Francisco, CA 94104
(415) 464-4974

QUESTIONS PRESENTED

Whether the precedent setting decision reached by the California Court of Appeals in the above-entitled case denying the next of kin the right to possess and control the disposition of the bodies of their deceased relatives triggers a Due Process violation that confers jurisdiction on this Court to review on a writ of certiorari.

Whether the rights of possession and control of one's own body is a property interest protected by the Due Process Clause.

Whether the rights of possession and control of one's own body is a property interest protected by the Due Process Clause that passes to the next of kin at death.

Whether the rights of possession and control of one's own body is a property interest protected by the Due Process Clause that passes to the next of kin for purposes of determination of the disposition of the remains of a deceased person.

Whether the precedent setting Opinion issued by the California Court of Appeals in the above-entitled case holding that two separate California statutes be read in conjunction not consecutively as was written triggers a Due Process Clause violation when the effect of the ruling grants a Peremptory Writ of Mandate extinguishing the rights of the Plaintiff to seek redress for the denial of her right to determine the disposition of the remains of her son at death.

Whether the precedent setting Opinion issued by the California Court of Appeals in the above-entitled case holding that two separate California statutes be read in conjunction not consecutively as was written triggers a Due Process Clause violation when the effect of the ruling grants a Peremptory Writ of Mandate and results in a loss of property in the form of payment of costs to the Defendants.

Whether the precedent setting Opinion issued by the California Court of Appeals in the above-entitled case triggers a Due Process Clause violation when de novo Standard of Review was not applied to the issues raised by two separate pleadings, instead combining the arguments raised by one Defendant Dr. Benson with the Defendants the County of San Mateo and Robert Foucrault without providing the Plaintiff notice or the opportunity to brief the new issues raised that resulted in the granting of a Peremptory Writ of Mandate and results in a loss of property in the form of payment of costs to the Defendants.

Whether the precedent setting Opinion issued by the California Court of Appeals in the above-entitled case triggers a Due Process Clause violation when de novo Standard of Review was not applied, instead combining the arguments raised by one Defendant Dr. Benson in a separate summary judgment pleading with the arguments raised by the Defendants the County of San Mateo and Robert Foucrault without providing the Plaintiff notice or the opportunity to oppose the issues raised, the effect of which is the improper review grants a Peremptory Writ of Mandate

extinguishing the rights of the Plaintiff to seek redress for the denial of her right to determine the disposition of the remains of her son at death.

Whether the precedent setting Opinion issued by the California Court of Appeals in the above-entitled case triggers a Due Process Clause violation when de novo Standard of Review was not applied, instead combining the arguments raised by one Defendant Dr. Benson in a separate summary judgment pleading with the arguments raised by the Defendants the County of San Mateo and Robert Foucrault without providing the Plaintiff notice or the opportunity to oppose the issues raised, the effect of which is the improper review grants a Peremptory Writ of Mandate and results in a loss of property in the form of payment of costs to the Defendants.

Whether the issuance of a Peremptory Writ of Mandate that denies a plaintiff procedural Due Process when de novo review was not followed triggers a constitutional deprivation of Due Process when the result is the loss of property in the form of a judgment against the Plaintiff.

Whether the issuance of a Peremptory Writ of Mandate triggers a constitutional deprivation of Due Process when a statutory interpretation alters the plain meaning of the language of a statute and results in the loss of property in the form of a judgment against the Plaintiff.

Whether the issuance of a Peremptory Writ of Mandate triggers a constitutional deprivation of Due Process when a statutory interpretation combines two statutes in order to reach an

opinion in favor of the Defendants that results in the loss of property in the form of a judgment against the Plaintiff.

Whether the issuance of a Peremptory Writ of Mandate triggers a constitutional deprivation of Due Process when the State acts to deprive the Plaintiff of a post-deprivation hearing on the merits, thereby extinguishing the Plaintiff's right to seek redress.

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JURISDICTIONAL STATEMENT

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without Due Process of law." U.S. Const. amend. XIV, §1. At the threshold, a claim under § 1983 for an unconstitutional deprivation of property must show (1) a deprivation (2) of property (3) under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 536-37, 101 S.Ct. 1908, 68 L. Ed. 2d 420 (1981). When the California Court of Appeals issued a Peremptory Writ of Mandate in the above-entitled case, the effect was a sanctioning by the State of a denial of pre- and post-deprivation process afforded to the Plaintiff by the Constitution. The issuance of the Peremptory Writ extinguishes the constitutional rights of the Plaintiff to a hearing to provide an opportunity to vindicate her claims. *Board of Regents v. Roth*, 408 U.S. 577, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972). When the California Court of Appeals issued its opinion May 25, 2010, that on its face does not follow de novo review, employs a method of statutory interpretation that ignores plain language by combining two statutes, and rewrites the law, making California coroners and independent contractors interchangeable, the effect was to remove a procedure -- notice prior to the deprivation and a remedy -- and the opportunity to seek redress for the deprivation in California's courts. By publishing the Opinion on June 22, 2010, the Opinion set precedent in California that conflicts with a recent decision In New York State [*Shipley v. City of New York*] and

allows California coroners/independent contractor doctors the authority to retain body parts after the performance of a lawful autopsy without the notification and consent of the next of kin, which results in the loss of the common law right to control the disposition of the remains at death. In so doing, California has ignored previous relevant decisions by this Court that recognize "the right of every Individual to the possession and control of his own person, free from all restraint or interference of others," *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1981). It is "so rooted in the traditions and conscience of our people," *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934), overruled in part, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964), as to be ranked a fundamental liberty protected by the "substantive" component of the Due Process Clause. *Schmerber v. California*, 384 U.S. 757, 772, 86 S.Ct. 1826, 16 L. Ed. 2d 908 (1966). ("The integrity of an individual's person is a cherished value of our society."); *Rochin*, 342 U.S. at 174, 72 S.Ct. 205 (describing unauthorized physical invasions of the body as "offensive to human dignity"). A liberty, this Court has "strongly suggested," extends to the rights of the individual and next of kin to determine "how to best protect dignity and independence at the end of life." *Washington v. Glucksberg*, 521 U.S. 702, 716, 720, 117 S.Ct. 2258, 138 L. Ed. 2d 772 (1997); *Cruzan v. Missouri Dept of Health*, 497 U.S. 261, 302, 305, 110 S.Ct. 2841, 111 L.Ed. 2d 224 (1990). Therefore, the Due Process Clause of

the Fourteenth Amendment provides this Court jurisdiction to review the decision of the California Court of Appeals to issue a Peremptory Writ of Mandate denying the Plaintiff pre- and post-deprivation process on a Writ of Certiorari.

STATEMENT OF FACTS

On October 25, 2006, Plaintiff's son Nicholas Picon died a sudden death. On October 26, 2006, Dr. Peter A. Benson an independent contractor employed by the County of San Mateo since the 1960's, conducted an autopsy on the remains of Nicholas Picon. At the conclusion of the autopsy which ended on the same date as it began, the body, minus the heart, was released to the funeral home. The Plaintiff was not notified nor asked to grant consent of the heart's removal and retention by Dr. Benson. On October 30, 2006, the Plaintiff had a funeral for her son and she was not aware that his heart was not with the remains that she lay to rest. On November 13, 2006, the Plaintiff learned that her son's heart had been retained and was sent to Stanford University for scientific research. On November 21, 2006, San Mateo Coroner Robert Foucrault returned a human heart to the Plaintiff. *Benson v. Superior Court*, 185 Cal.App. 4th 1179 (2010). See Opinion at pages 2-3; see, generally, Third Amended Complaint hereinafter "TAC."

PROCEDURAL HISTORY

On October 24, 2007, Plaintiff filed a civil suit in San Mateo Superior Court against Coroner Foucrault and the County of San Mateo for 1) Breach of mandatory duty; 2) Breach of the right to control the disposition of the remains of a deceased person; 3) Negligent infliction of emotional distress. On January 28, 2008, Plaintiff filed a first amended complaint adding an additional cause of action alleging that Coroner Foucrault and the County of San Mateo violated the Plaintiff's constitutional rights of Due Process under 42 U.S.C.S. Section 1983. The case was removed to Federal District Court by the Defendants County of San Mateo and Coroner Robert Foucrault. On July 10, 2008, Judge Samuel Conti dismissed with prejudice the Due Process cause of action and remanded the three remaining causes of action. On August 28, 2008, Judge Joseph C. Scott dismissed with prejudice the breach of mandatory duty cause of action. On September 12, 2008, the Plaintiff filed a second amended complaint alleging breach of the right to control the remains of a deceased person and negligent infliction of emotional distress. The second amended complaint named the independent contractor Dr. Peter A. Benson as a Defendant. After motion practice the third amended complaint was filed on January 13, 2009. On October 6, 2009, Defendant Peter A. Benson filed a motion for Summary Judgment. On September 30, 2009, Defendants County of San Mateo and Robert Foucrault filed a motion for

Summary Judgment or Summary Adjudication. On December 21, 2009, Judge John L. Grandsaert denied the Defendants' motions and the case was set for trial on the merits to be heard on January 25, 2010. On January 12, 2010, the independent contractor Dr. Peter A. Benson filed a petition to the California Court of Appeals for a Peremptory Writ of Mandate and requested a stay of the trial. On January 14, 2010, the County of San Mateo and Coroner Robert Foucrault filed a petition to the California Court of Appeals for a Peremptory Writ of Mandate and requested a stay of the trial. On January 15, 2010, the California Court of Appeals stayed the trial and issued a Palma Notice to the Plaintiff. On March 2, 2010, on the Court's own motion, the Court consolidated the two writ petitions. On May 25, 2010, the California Court of Appeals filed the Opinion granting the Peremptory Writ. On June 22, 2010, the California Court of Appeals published the Opinion, which then set precedent throughout the State of California. On July 6, 2010, the Plaintiff timely filed a petition for rehearing with the California Court of Appeals thereby reserving contested facts and issues for review. On July 13, 2010, the petition for re-hearing was denied. On July 29, 2010, the Plaintiff timely filed a petition for review with the Supreme Court of California. On September 22, 2010, the Supreme Court of California denied review. On October 25, 2010, the California Court of Appeals issued a remittitur to the Superior Court of San Mateo County ordering the Superior Court to vacate its orders denying Defendants' motions for summary

judgment. On November 5, 2010, the Superior Court of San Mateo issued an order granting Summary Judgment in favor of the Defendants. On November 22, 2010, the Superior Court of San Mateo entered a judgment against the Plaintiff in favor of the Defendants Robert Foucrault and the County of San Mateo awarding costs and disbursements incurred in defense of the action. On November 23, 2010, the Superior Court of San Mateo entered a judgment against the Plaintiff in favor of the independent contractor Dr. Peter A. Benson awarding costs and disbursements incurred in defense of the action. *See* attached Judgments and Orders.

DUE PROCESS

As noted above, the Plaintiff expressly raised the Due Process issue in the trial court when she filed the first amended complaint adding an additional cause of action alleging that Coroner Foucrault and the County of San Mateo violated the Plaintiff's constitutional rights of Due Process under 42 U.S.C.S. Section 1983. The face of the first amended complaint at page 13, lines 15-16, states, "If this court rejects the allegations presented in the preceding causes of action then it will be rejecting them under color of state law." At page 15, lines 9-12, Plaintiff states:

> ...If the standards set forth in California Government Code §§ 27491.4(a), and 27491.45(b) allow the San Mateo County Coroner to deprive

> the Plaintiff of her property interest in the remains of her deceased child a violation of the Fourteenth Amendment has occurred and the County and the Coroner are liable to the Plaintiff in an action at law suit in equity, or other proceeding for redress under the Constitution of the United States.

In her Reply Brief to the Supreme Court of California at page 3, the Plaintiff stated:

> If the Court of Appeals' decision were to stand it would eliminate any individual right to pre-deprivation Due Process when the coroner/independent con-tractor acts to retain body parts and render moot the procedural safeguards contemplated by the legislatures when drafting the statutory framework authorizing the coroner to conduct autopsies in order to determine the case [sic] of death.

The Supreme Court of California declined to review the issue.

INAPPROPRIATE STANDARD OF REVIEW RESULTING IN THE DENIAL OF DUE PROCESS

In addition to the aforementioned denial of Due Process, the California Court of Appeals denied the Plaintiff the Due Process afforded to her by the

Constitution when the published opinion did not follow de novo review. The opinion, commencing at page 5, states, citations omitted:

> We review summary judgment appeals by applying the same three step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, if the movant has met its burden, we consider whether the opposition raised triable issues of fact.

Paradoxically, the opinion goes on to state at page 9:

> Dr. Benson's arguments overlap to a great degree with Foucrault and the county's arguments, but rather than rely on statutory immunity, he simply argues he had no duty to obtain Picon's consent to retain her son's heart. He asserts any limited quasi-property right Picon might have had in her son's remains cannot be expanded to conflict with statutes (§§ 27491.4 and 27491.45) permitting the coroner to retain organs and tissues collected during an autopsy.

> Finally, Dr. Benson also contends Picon's claims against him are barred by the applicable statute of limitations. Although Foucrault and the county's points are well taken, we believe the most straightforward explanation here is that Picon never established that Defendants owed her a duty to obtain her consent before retaining her son's heart.

Despite the fact that the California Court of Appeals purports to follow de novo review, the opinion on its face states that the arguments raised by one Defendant in a separate summary judgment motion being reviewed by the writ was applied to two other Defendants [County of San Mateo and Robert Foucrault] despite the fact that the arguments were not raised; therefore not opposed by the Plaintiff in either her opposition to the summary judgment/ summary adjudication of issues nor the opposition filed against the writ petitions. Despite the fact that the Plaintiff timely filed a petition for rehearing raising the issue of the denial of notice, the California Court of Appeals denied the petition for rehearing and the California Supreme Court denied the timely filed petition for review. The Plaintiff raised the improper standard of review followed in the petition for rehearing at page 20, which states:

> The application of a new issue not raised by the moving papers denies the Plaintiff a very basic tenet of law, notice. The Plaintiff cannot

> reasonably be expected to oppose an issue that was not raised in the moving papers. To grant a writ reversing the denial of summary judgment of such an important precedent setting case based on an issue not properly before the court or the litigant opposing it is unjust to say the least. The Plaintiff is requesting modification/reversal of the inter-locutory order issued by this Court to the extent the Writ of Mandate was based improperly upon the non-establishment of a duty owed to the Plaintiff by the Defendants/Petitioners Robert Foucrault and San Mateo County where the issue was not put before the trial court nor was the Plaintiff afforded the statutorily prescribed time to oppose.

Despite the fact that the Plaintiff timely raised the issue of improper standard of review, the California Court of Appeals denied rehearing. The effect of this triggered a violation of Plaintiff's constitutionally protected right to Due Process when the writ was issued granting summary judgment/summary adjudication denying the Plaintiff the opportunity to seek redress to vindicate her claims and awarding a monetary judgment in favor of the Defendants.

DENIAL OF RIGHT TO DETERMINE THE DISPOSITION OF REMAINS OF A DECEASED PERSON

The Denial of Right to Determine the Disposition of Remains of a Deceased Person is alleged in the original, first, second and third amended complaints. At page 20, lines 5-8, of the TAC [which was the operative pleading at the time of the issuance of the Peremptory Writ of Mandate] Plaintiff states:

> In sum, Plaintiff alleges that she was denied her legally cognizable right to determine the disposition of the remains of her son to bury him and lay his remains to rest in a manner of her own choosing.

At page 27, lines 16-21, of the TAC, Plaintiff states:

> Plaintiff alleges and her factual allegations demonstrate that if she is unsuccessful in her attempts to prevail in this lawsuit, coroners of this state and beyond would be effectively given the green light to the unauthorized retention of organs and body parts at will without providing notice to the next of kin for any reason whatsoever as determined by the Coroner.

Plaintiff goes on to state at page 27, lines 22-24:

> Plaintiff contends that the argument would be that by simply returning any portion of a corpse, essentially anything the Coroner deems to be "not to be the whole body," he will have acted within the law.

Further at page 28, lines 4-7:

> Plaintiff alleges that as a result of the factual allegations of her case Coroners of this state will continue to abuse discretion conferred to them by statute and do so with added vigor and authority if she is unsuccessful in her attempts to put a halt to the abuses that she alleges to have occurred.

In the timely filed petition for re-hearing at page 28, the Plaintiff argued:

> Lastly, California Gov Code section 27491.4 was amended in 1979 to include an entire provision regarding consent and recognizing the "person who has acquired the right to control the disposition of the remains" (§ 27491.4, subd. (b).). Therefore the legislatures' intent clearly is to recognize a property interest in the disposition of the remains of a deceased person at autopsy.

THE OPINION GRANTS TO THE INDEPENDENT CONTRACTOR THE AUTHORITY WITHOUT LIABILITY TO RETAIN BODY PARTS WHICH DENIES LITIGANTS DUE PROCESS

Dr. Benson is an independent contractor that by statute is not authorized to retain human body parts without the express consent of the next of kin. Despite this fact, the California Court of Appeals in its published opinion has held that the independent contractor doctor has interchangeable authority with the Coroner, an elected sworn peace officer that has a fiduciary duty to the public. The new authority granted by the California Court of Appeals in its published opinion at page 13, rewrote the existing law:

> ...we disagree with Picon that the legislature literally meant only the person occupying the office of corner can make the decision to retain parts of the body removed at autopsy. Instead, we hold a physician employed by the Coroner may make that decision.

The fact that a determination that the independent contractor doctor does not have the same authority as the Coroner was argued by the Plaintiff in her opposition to Writ A127305 commencing at the bottom of page 25:

> If this Court were to give any consideration to the argument that an independent contractor not vested with the authority conferred by

> statute should be allowed to make unilateral decisions regarding the retention of entire organs then this Court would be writing new law and superseding the language and the intent of the legislators when drafting the existing statutes into law.

Again in her opposition to Writ A127305, the Plaintiff at page 26 argues:

> Therefore to argue before this court in an application for writ review that Dr. Benson is somehow authorized by statute to act in regards to a nondelegable duty when making the determination to retain an entire organ is contravene not only to the statutes, his actions are expressly unauthorized by the language of his own contract with the County of San Mateo.

By ignoring both the plain language of the statute and the legislative history in its opinion the California Court of Appeals has denied the Plaintiff procedural and substantive due process of law. The effect of which has denied the Plaintiff her right to vindicate her claims of wrongdoing.

Furthermore, in her opposition to the two separate summary judgment motions at Exhibit 9, page 453, lines 18-24, the Plaintiff stated:

> It was not reasonably necessary for the Coroner in this case to retain the heart separate from the burial of the body. As we have read in the facts above, the body was not buried until October 30, 2006; one day after Dr. Benson was done taking the samples from the heart. Had Dr. Benson bothered to inform the family that the heart would be retained for a little while longer until the samples were obtained, the heart could have been buried with the body and none of these issues would have arisen.

By sanctioning the conduct of the independent contractor Dr. Benson, the Supreme Court of California has rubber-stamped the denial of pre- and post-deprivation Due Process afforded the Plaintiff by the Constitution.

A statutory interpretation by the California Court of Appeals that two separate statutes be read concurrently is a denial of due process when the facts as applied to the statute clearly state that the actions of the Defendants went beyond the authority conferred by the statutes.

The opinion at page 15 states, "We agree with the Defendants that Section 27491.4 must be read in conjunction with Section 27491.45, which specifically provides for retaining parts of the body." Despite the fact that in the timely filed petition for rehearing, the Plaintiff pointed out at pages 24-25, the fact that:

> ...section 27491.45 contains not one but two consent requirements; specifically, California Government Code Section 27491.45(b) was added by amendment in 1973 to the original statute enacted in 1965 and this specific section most recently amended in the year 2000 reads: (b) The coroner may, in his discretion, allow removal of parts of the body by a licensed physician and surgeon or trained transplant technician for transplant, or therapeutic, or scientific purposes pursuant to Chapter 3.5 (commencing with section 7150) of Part 1 Division 7 of the Health and Safety Code, only if the following conditions are met: (1) The provision of the part will not necessarily mutilate the body or interfere with the autopsy. (2) The decedent or other person, as specified in Section 7151 of the Health and Safety Code, has consented...

Despite the fact that the Plaintiff timely pointed out the fact that reading the two separate statutes together to support its opinion expressly contradicts the plain language and legislative history of section 27491.45, the California Court of Appeals denied rehearing and the California Supreme Court denied review thereby rewriting law and denying the Plaintiff Due Process. The effect of which extinguished her constitutionally

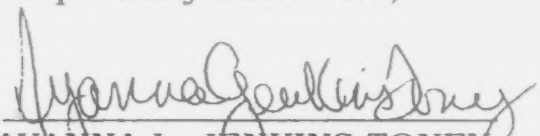
protected right to seek redress in a court of law to vindicate her claims of injury. The denial was exacerbated further by the resulting entry of a monetary judgment against the Plaintiff without Due Process.

ALLOWANCE FOR ISSUANCE OF THE WRIT

The Supreme Court of California has decided that citizens that die under circumstances that warrant an autopsy in California have no right to determine the disposition of their remains at death because the coroner/independent contractor doctor has complete autonomy to retain body parts for scientific research, the determination of the cause of death, or coroner training. Furthermore, the California Supreme Court has upheld a ruling that states that a coroner/ independent contractor doctor has no duty to request consent before retaining body parts. This ruling eradicates the long-standing principle that the next of kin has the control to determine the disposition of the remains at death. This decision decided a common law federal question differently than the Supreme Court of New York State in *Shipley v. New York*, which was filed on September 28, 2010. Furthermore, the issue of the common law right of the next of kin to determine the disposition of the remains at death is an important question of federal law that has not been, but should be, settled by this Court. The decision of the Supreme Court of California to

deny review conflicts with the afore-mentioned relevant decisions of this Court. Furthermore, the precedent setting Opinion in California conflicts with the traditional common law premise that the right of possession and control of one's own body is a sacred right that should be afforded protection when the right is taken from the individual and his/her next of kin without Due Process where existing rules and procedures enacted by the legislature of the state are ignored and/or rewritten by the judiciary.

Respectfully submitted,



AYANNA L. JENKINS TONEY
Attorney for Plaintiff
Petitioner ISOLINA PICON

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

PETER A. BENSON, Petitioner, v. Super. THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; ISOLINA PICON, Real Party in Interest.	A127285 (San Mateo County Ct. No. CIV 467161)

COUNTY OF SAN MATEO et al., Petitioners, No. v. THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; ISOLINA PICON, Real Party in Interest.	A127305 (San Mateo Super. Ct. CIV 467161)

A county coroner, conducting an inquiry into cause of death, has no duty to obtain consent from next of kin before retaining a part of the decedent's body to determine cause of death, or for scientific investigation or coroner training. We therefore grant the petitions for extraordinary relief filed by the defendants in the underlying action and direct the trial court to enter judgment for defendants.

BACKGROUND

Twenty-three-year-old Nicholas Picon died unexpectedly at home. On October 26, 2006, defendant Peter A. Benson, M.D., a forensic pathologist, performed a postmortem exam on behalf of the San Mateo County Coroner's Office. Dr. Benson had performed postmortem exams under contract with the county since 1968.

Dr. Benson found a "structural abnormality" in Nicholas Picon's heart during the course of the postmortem exam. Dr. Benson decided to retain the heart for further examination. He also ordered toxicology tests.

Three days later, Dr. Benson reexamined the heart. He took tissue samples and sent them to an outside laboratory for preparation of biology slides.

By November 9, 2006, Dr. Benson had received the biology slides and the toxicology test results ("negative for drugs and medication"). Dr. Benson concluded the cause of death was "probable

cardiac dysrhythmia due to intramural tunneling of the left anterior descending coronary artery." Dr. Benson, however, intended to send the heart to a heart pathology specialist at Stanford University to confirm his findings.

Meanwhile, the coroner's office had released Nicholas Picon's body, and his mother, plaintiff Isolina Picon (Picon), buried his remains on October 30, 2006. According to Picon, no one from the coroner's office informed her that her son's heart had been retained. When she learned the coroner's office had retained the heart, she asked for its return. The coroner returned the heart on November 20 or 21, 2006.

Picon sued the County of San Mateo, County Coroner Robert Foucrault, and Dr. Benson. She purported to state causes of action for (1) "denial of quasiproperty right to control the remains of a deceased person," and (2) negligence. Picon alleged that Dr. Benson's retention of the heart was "unauthorized." She believed Dr. Benson had retained the heart for his own "self serving interest" and so that it could be released to Stanford University. Her amended complaint states Dr. Benson was "intrigued by the rarity of the heart condition that ultimately led to [her son's] untimely death." Foucrault was to blame for allowing Dr. Benson "unfettered freedom." Thus Foucrault (and presumably the county, too) "became vicariously liable for Dr. Benson's actions."

The defendants moved for summary judgment. Foucrault and the county argued that retention of

the heart was authorized by state law, and that they were also immune from liability for discretionary acts under the applicable provisions of Government Code[1] sections 815 and 820.2. Dr. Benson similarly argued his actions were authorized by state law, and that he had no duty to obtain Picon's consent before retaining her son's heart.

In opposition to defendants' motions, Picon submitted an expert declaration that cast doubt on Dr. Benson's conclusions and his need to retain the heart. Judy Melinek, M.D., a forensic pathologist, believed Nicholas Picon did not die from coronary artery tunneling. In her opinion a viral infection that had spread to his heart had led to his death. Dr. Melinek did not "understand why the entire heart organ was retained in this case." She opined, "There was no clinical diagnostic reason that I could see that would necessitate the retention of Nicholas Picon's entire heart organ."

The trial court denied defendants' motions, finding a disputed issue of fact as to why defendants had retained the heart. The trial court concluded: A reasonable trier of fact, based upon the conclusions of Dr. Melinek, could infer that Dr. Benson did not need the entire heart organ to ascertain cause of death, and thus that there were other reasons why the heart was retained.

DISCUSSION

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[1] All code section references are to the Government Code unless otherwise noted.

Standard of Review

An order denying a motion for summary judgment may be reviewed by a petition for peremptory writ. (Code Civ. Proc., § 437c, subd. (m)(1).) The standard of review is the same regardless of whether the trial court grants or denies a summary judgment motion. "Rulings on such motions are examined de novo." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.)

> We review summary judgment appeals by applying the same three-step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, if the movant has met its burden, we consider whether the opposition raised triable issues of fact.

(*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 939-940, italics omitted; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Ca1.4th 826, 849-855.)

The Coroner's Duties

The coroner's many duties are enumerated at section 27460 et seq. One of the coroner's principal duties is of course to inquire into and determine the cause of death in appropriate

cases. (See § 27491.) There is no dispute here that the death of Nicholas Picon warranted an inquiry.

To perform this inquiry, the coroner may order a postmortem examination or autopsy. (§ 27491.4, subd. (a).)[2] The coroner may "make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body." (*Ibid.*) The coroner is statutorily authorized to retain tissues as necessary or advisable to the inquiry. (*Ibid.*; see also Health & Saf. Code, § 7102 [coroner entitled to custody of remains of person whose death is subject of investigation until conclusion of autopsy or

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[2] Section 27491.4, subdivision (a) provides: "For purposes of inquiry the coroner shall, within 24 hours or as soon as feasible thereafter, where the suspected cause of death is sudden infant death syndrome and, in all other cases, the coroner may, in his or her discretion, take possession of the body, which shall include the authority to exhume the body, order it removed to a convenient place, and make or cause to be made a postmortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. No person may be present during the performance of a coroner's autopsy without the express consent of the coroner."

medical investigation].)[3] In addition, the coroner may retain parts of the body that, in the opinion of the coroner, may be necessary or advisable for scientific investigation and training. (§ 27491.45, subd. (a)(1).)[4] The coroner may employ outside laboratories, hospitals, or research institutions to conduct the coroner's scientific investigation or training. (*Ibid.*) The coroner may release parts of the body to third parties for noncoroner training, educational, and research purposes, but in that case the coroner must obtain consent under the methods described in the Uniform Anatomical Gift Act. (Health & Saf. Code, § 7150 et seq.)

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[3] There are specific statutory provisions regarding the removal of the pituitary glands (§ 27491.46) and corneal eye tissue (§ 27491.47). They are not at issue here.

[4] Section 27491.45, subdivision (a)(1) provides: "The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training."

Note section 27491.45 does not reflect the Legislature's repeal of Health and Safety Code section 7150.1 when it revised the Uniform Anatomical Gift Act in 2007. (See Stats. 2007, ch. 629, § 1.) The Act's definition of parts of the body now appears in Health and Safety Code section 7150.10, subdivision (a)(18), and includes organs.

To fulfill his or her duties, the coroner may:

> ...summon a surgeon or physician to inspect the body or hold a post mortem examination or a chemist to make an analysis of the stomach or the tissues of the deceased and give a professional opinion as to the cause of the death.

(§ 27499). When there is a question as to the cause of death, the coroner acts "within his authority in ordering an inquest held, and in authorizing his autopsy surgeon to proceed in the usual manner." (*Huntly v. Zurich General A. & L. Ins. Co.* (1929) 100 Cal.App. 201, 214.)

Defendants' Contentions

Foucrault and the county point out that the Government Code grants substantial discretion to the coroner in performing the duties of his office, including discretion to retain tissues and parts of the body. They therefore rely on section 820.2, which provides a public employee is not liable for injuries resulting from an exercise of discretion. Alternatively, Foucrault and the county argue that neither Dr. Melinek's declaration nor any of Picon's other factual assertions created a triable issue of fact. In their opinion, there was no evidence to support an inference that Dr. Benson retained the heart for some improper reason.

Dr. Benson's arguments overlap to a great degree with Foucrault and the county's arguments, but rather than rely on statutory

immunity, he simply argues he had no duty to obtain Picon's consent to retain her son's heart. He asserts any limited quasi-property right Picon might have had in her son's remains cannot be expanded to conflict with statutes (§§ 27491.4 & 27491.45) permitting the coroner to retain organs and tissues collected during an autopsy. Finally, Dr. Benson also contends Picon's claims against him are barred by the applicable statute of limitations.

Although Foucrault and the county's points are well taken, we believe the most straightforward explanation here is that Picon never established that defendants owed her a duty to obtain her consent before retaining her son's heart.

Duty of Care

> Whether a defendant owes a duty of care is a question of law. A defendant may be liable in tort for negligently inflicting emotional distress on persons to whom the defendant owes a duty of care. That duty can have three alternative origins: (1) a duty imposed on the defendant by law, (2) a duty assumed by the defendant, or (3) a duty arising out of a preexisting relationship between plaintiff and defendant.

(*Aguirre-Alvarez v. Regents of University of California* (1998) 67 Cal.App.4th 1058, 1063; see also § 815, subd. (a) [public entity not liable for

injury except as otherwise provided by statute].)

Picon appears to rely on a duty imposed by law. Paradoxically, however, she relies on the very law --sections 27491.4 and 27491.45 -- that allows defendants to retain tissues and parts of the body. Those sections do not require consent from next of kin to do so. Consent is required only when the coroner releases parts of the body to third persons for noncoroner purposes. (§ 27491.45, subd. (a)(2).)

In light of the specific statutory authorization to retain parts of the body removed at an autopsy, it is difficult to discern any duty defendants owed to Picon before making the decision to retain her son's heart in this case. Picon cites little in the way of legal authority or facts to persuade us otherwise. She does attempt to parse the language of sections 27491.4 and 27491.45 to support her case. We will discuss her arguments point by point.

Dr. Benson's Status as an Independent Contractor

Picon attaches great significance to the fact Dr. Benson is an independent contractor. According to Picon,

> Petitioner's [sic] are not immune from liability based on the fact that Dr. Benson is an independent contractor and his actions were not authorized by California Government Code section 27491.4 or 27491.45(a)(1) & (2).

She points out those sections grant only the "coroner" the discretion to retain tissues or parts of the body; thus, Dr. Benson did not have the authority to make the decision to retain her son's heart.

Picon appears to be suggesting a government officer cannot act through, or delegate authority to, an expert. Outside of sections 27491.4 and 27491.45 themselves, she cites no authority for this surprising proposition.

The law does not presume the coroner will personally conduct postmortem examinations. The coroner, in his or her discretion, may make or "cause to be made" a postmortem examination. (§ 27491.4, subd. (a).) The coroner may summon physicians to conduct postmortem exams (§ 27499), and may employ outside laboratories, hospitals, or research institutions to conduct the coroner's scientific investigation (§ 27491.45, subd. (a)(1)).

In this case, Foucrault, who was elected to the position of coroner, is not a medical doctor. (Compare § 24010 [providing for office of medical examiner in lieu of office of coroner].) He must therefore employ physicians such as Dr. Benson to conduct postmortem exams. The record shows Foucrault granted Dr. Benson the authority to use his professional medical judgment to conduct such exams, including the authority to retain organs for purposes of investigation into cause of death. According to Dr. Benson, he has had that authority through "three coroners, three chief deputy coroners, over a period of 47 years."

Foucrault delegated the direct supervision of Dr. Benson to his chief deputy. Foucrault's chief deputy at that time was also not a doctor, having joined the coroner's office after working in law enforcement. The chief deputy approved (albeit after the fact) Dr. Benson's decision to retain Nicholas Picon's heart.

Given the coroner's duties and the realities involved in performing those duties, we disagree with Picon that the Legislature literally meant only the person occupying the office of coroner can make the decision to retain parts of the body removed at an autopsy. Instead we hold a physician employed by the coroner may make that decision.[5]

Tissues of the Body

Although not set forth in a separate argument in her briefs, Picon alludes to the language in section 27491.4, subdivision (a), that allows the

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[5] Although Picon attaches much significance to Dr. Benson's employment status, she never discusses the legal basis for the county's liability for Dr. Benson's acts. (See § 815.4 [public entity liable for injury proximately caused by tortious act or omission of independent contractor to same extent public entity would be subject to liability if it were a private person].) As a general rule, an employer of an independent contractor is not liable for physical harm caused to another by the contractor. (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 970.) Although there are many exceptions to the general rule (see Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2009) ¶ 2:327 et seq., p. 2-95 et seq.), we are left to guess what exception might apply here.

coroner to retain "only those tissues of the body" necessary for the coroner's inquiry. Picon apparently believes the reference to tissues precludes retention of an entire organ.

Section 27491.4 does distinguish between tissues of the body and organs in another part of subdivision (a) (make an "analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body"). Further, relevant dictionary definitions of the word "tissue" do not inexorably lead to a conclusion the word includes organs of the body.[6]

The problem for Picon, of course, is that while section 27491.4 might not expressly provide for retention of organs, section 27491.45 does. That section specifically permits the retention of parts of the body removed at the time of an autopsy to study them. Picon alleges Dr. Benson retained her son's heart because he was intrigued by the rarity of the heart condition he had discovered. In other words, he wanted to study it. There is no hint or suggestion that Dr. Benson retained the heart for

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[6] Stedman's Medical Dictionary (27th ed. 2000) page 1838, provides the following definition of tissue: "A collection of similar cells and the intercellular substances surrounding them." According to that dictionary, there are four basic tissues in the body, including muscle tissue. (*Ibid.*) "[C]ardiac muscle" is listed under the definition. (*Ibid.*) The Attorneys' Dictionary of Medicine, however, in defining "tissue," states, "An organ also has a special function, and it may be composed of one kind of tissue, but usually it is composed of several kinds of tissue, and in this respect it differs from a tissue." (6 Schmidt, Attorneys' Dict. of Medicine, p. T-144 (rev. 12/2009).)

some depraved or repugnant purpose. Instead he allegedly sought to satisfy his or a colleague's scientific curiosity regarding the heart condition. Only if that scientific curiosity had led to the release of the heart to a third party for noncoroner research purposes would consent from next of kin have been required. (*Id.*, subd. (a)(1).) Notwithstanding much insinuation by Picon of a conspiracy to funnel body parts to Stanford University for research, she produced no evidence to rebut defendants' showing that Nicholas Picon's heart did not leave the coroner's office. (See *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250-1253 [evidence of general pattern of misconduct not sufficient to support claim that defendant mishandled plaintiff's decedent's body].)[7]

Ironically, the only reason the distinction between tissues and organs is relevant here is because defendants insist the sole reason they retained Nicholas Picon's heart was to investigate cause of death. Thus it is defendants themselves who invoke section 27491.4 as authority for the discretion to retain an organ to determine cause of death.

We agree with defendants that section 27491.4 must be read in conjunction with section 27491.45, which specifically provides for retaining

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[7] We hasten to add that although there was evidence the coroner's office utilized the services of Stanford University to determine cause of death, Picon produced no evidence of a conspiracy to funnel body parts to Stanford University for research.

parts of the body. "Under [section] 27491.4 et seq., the coroner is authorized to remove, and either retain or release to specified entities, body tissues and parts." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Criminal Procedure, § 43, p. 65.) The scientific study permitted by section 27491.45 must include a study to determine cause of death. Otherwise, the coroner could retain an organ for scientific study or training, but not for determining cause of death, one of the coroner's primary missions. We can think of no reason the Legislature would intend such a result, and Picon suggests none.[8] (See *Pacific Southwest. Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 169 [code sections in pari materia must be harmonized with each other to extent possible].)

Quasi Property Right and the Palmquist Case

As Picon contends, she had a temporary, *quasi-property* right in the body of her deceased son for purposes of burial. (See *Spates v. Dameron Hospital Assn.* (2003) 114 Cal.App.4th 208, 221-222; see also Health & Saf. Code, § 7100; 5

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[8] At a time when the law did not expressly provide for the retention of tissues or organs, the Attorney General nevertheless opined: "We therefore conclude that no legal liability attaches to the coroner or autopsy surgeon who, in order to discover the cause of death—a duty imposed upon him by law—removes tissue and organs and, when reasonably necessary to complete his diagnosis, retains them after the burial of the body." (27 Ops.Cal.Atty.Gen. 46, 49 (1956).)

Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 460, pp. 681-684.) The right is typically invoked in actions involving malfeasance by funeral homes. (See, e.g., *Sinai Temple v. Kaplan* (1976) 54 Cal.App.3d 1103, 1110-1112; *Cohen v. Groman Mortuary, Inc.* (1964) 231 Cal.App.2d 1, 4-5, disapproved on other grounds in *Christensen v. Superior Court* (1991) 54 Ca1.3d 868, 889.) Next of kin, however, have also asserted the right against the coroner. (See, e.g., *Davila v. County of Los Angeles* (1996) 50 Cal.App.4th 137, 140 [failure to make reasonable efforts to locate next of kin]; *Gray v. Southern Pacific Co.* (1937) 21 Cal.App.2d 240, 242 [wrongful performance of autopsy].) There is no interference with that right, however, when the coroner performs a lawful autopsy. (*Gray v. Southern Pacific Co., supra,* at p. 246.)

The summary judgment record shows defendants performed a lawful autopsy. Picon nevertheless refers this court to *Palmquist v. Standard Acc. Ins. Co.* (S.D.Cal. 1933) 3 F.Supp. 358 (*Palmquist*), as support for her contention that defendants' retention of her son's heart interfered with her quasi-property right. She believes the facts of her case "mirror almost identically the facts in *Palmquist*."

Palmquist is a federal district court ruling on a motion for judgment notwithstanding the verdict. (*Palmquist*, supra, 3 F.Supp. at p. 359.) The case did involve the retention of organs following an autopsy. There the similarities between *Palmquist* and the instant case end. First and foremost, *Palmquist* did not involve the acts of a coroner.

The autopsy in *Palmquist* was performed by physicians representing an insurance company. They were hired to determine whether the decedent's death was accidental for insurance purposes. (*Ibid.*) Those physicians retained the decedent's heart, brain, and one kidney after the autopsy for further pathological examination. Some months later, the decedent's spouse asked that the organs be returned. Her request was refused. A jury returned a verdict in favor of the spouse for her emotional distress. The district court denied the defendants' motion for entry of judgment notwithstanding the verdict. (*Palmquist*, supra, 3 F.Supp. at p. 360.)

The federal court's decision in *Palmquist* says nothing regarding the duties of a coroner, and liability in *Palmquist* appears to have been found based not on the initial retention of the organs, but on the refusal to return them. *Palmquist* has no application here.

Unsupported Factual Claims

We believe we have sorted out and discussed Picon's best legal arguments, but Picon has also made several allegations of serious misconduct against the defendants, including claims that they may have altered the autopsy report and that the heart returned to her may not have been her son's heart. Many of those claims are not supported by a citation to the record; in fact Picon did not cite to the record in her statements of fact to this court. And in those instances where she has cited to the record, the referenced material does not

Defendants are entitled to recover their costs for this proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

_____
Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Sepulveda, J.

judgment was bereft of citations to the record. Her failure to cite to the record was not for lack of providing materials in opposition to the motions. Picon submitted hundreds of pages of deposition transcripts, numerous declarations, and several documentary exhibits in opposing the motions.

In any event, the summary judgment record contains nothing to rebut defendants' showing that Nicholas Picon's heart was removed and retained to determine cause of death. Not even Dr. Melinek's declaration, the one piece of evidence the trial court identified as contradicting that showing, created a material, triable issue of fact. That Dr. Melinek did not understand why Dr. Benson retained the entire heart, or that she did not believe there was any reason to retain the heart, was irrelevant to the question of whether the defendants acted within the discretion provided by sections 27491.4 and 27491.45. That she disagreed with Dr. Benson's decisions, actions, or conclusions does not mean defendants violated a duty to Picon. In fact, as defendants and amici curiae (the National Association of Medical Examiners and the California Society of Pathologists) point out, if anything Dr. Melinek's declaration actually underscores Dr. Benson's opinion that a specialist should confirm the cause of death. As things stand, we have two forensic pathologists reaching different conclusions on cause of death, so exactly why Nicholas Picon's heart failed remains unresolved.

provide an evidentiary basis for her claims. For example, in support of her allegation that Stanford University kept organs sent by the coroner for "scientific future research," she cites only to a long soliloquy by her attorney at Dr. Benson's deposition.

This failure to cite to evidence in the record repeats a pattern that began in the trial court. With the exception of a few references to the autopsy report, Picon's opposition to the motions for summary

Ultimately, the disagreement over whether Dr. Benson should have retained the heart (or how much of it he should have retained), and whether he reached the right conclusion on cause of death is irrelevant. Even if we credit Picon's more plausible factual allegations—that Dr. Benson retained the heart to study it and that he intended to send it to Stanford University for research—defendants would still be entitled to judgment in their favor. The law did not impose a duty on defendants to obtain Picon's consent unless and until they acted to send the heart to Stanford University for noncoroner purposes.[9]

Finally, if defendants are to blame for anything here, it is poor communication with the Picon family. To that end we note the record shows the coroner's office has now adopted a formal policy with respect to notifying family members of the retention of organs.

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to vacate its orders denying defendants' motions for summary judgment. Instead the court shall issue new orders granting those motions.

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[9] As we conclude defendants did not owe a duty to Picon, it is unnecessary for us to discuss Dr. Benson's statute of limitations argument.

Court of Appeal, First Appellate District,
Division Four - Nos. A127285/A127305

S184910

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PETER A. BENSON, Petitioner,

v.

SUPERIOR COURT OF SAN MATEO COUNTY,
Respondent;
ISOLINA PICON, Real Party in Interest,
AND CONSOLIDATED CASE.

The petition for review is denied.

/s/ GEORGE
Chief Justice

Court of Appeal, First Appellate District,
Division Four - Nos. A127285/A127305

S184910

IN THE SUPREME COURT OF CALIFORNIA

PETER A. BENSON, Petitioner,

v.

SUPERIOR COURT OF SAN MATEO COUNTY,
Respondent;
ISOLINA PICON, Real Party in Interest,

And consolidated case

On application of real party in interest and good cause appearing, it is ordered that the time to serve and file the reply to answer to petition for review is extended to and including September 13, 2010.

/s/ GEORGE
Chief Justice

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON,

Plaintiff,

vs.

COUNTY OF SAN MATEO, et al.,

Defendant

Case No. CIV 46761

ORDER AFTER REMITTITUR

Dr. Peter Benson's Motion for Summary Judgment, heard on December 21, 2009, is GRANTED. Judgment will be entered in favor of Dr. Peter Benson and against Isolina Picon.

San Mateo County's Motion for Summary Judgment, heard on December 21, 2009, is GRANTED. Judgment will be entered in favor of San Mateo County and against Isolina Picon.

The Court's Orders of January 5, 2010, filed on January 6, 2010, denying the Summary Judgment Motions of Dr. Peter Benson and San Mateo County, are VACATED.

Dated: NOV 05, 2010 /s/ John L. Grandsaert
Honorable John L. Grandsaert

HASSARD BONNINGTON LLP
JOSEPH C. GHARRITY, ESQ.,
State Bar No.117013
KRISTEN A. PICO, ESQ.,
State Bar No. 186022
Two Embarcadero Center, Suite 1800
San Francisco, California 94111-3941
Telephone: (415) 288-9800
Fax: (415) 288-9801
Attorneys for Defendant
PETER A. BENSON, M.D.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON,	No. CIV 467161
Plaintiff,	~~[PROPOSED]~~
vs.	JUDGMENT IN FAVOR OF
PETER A. BENSON, M.D., COUNTY OF SAN MATEO, et al.,	DEFENDANT PETER A. BENSON, M.D.
Defendants.	

This Court, having on November 5, 2010, granted defendant Peter A. Benson, M.D.'s Motion for Summary Judgment, and having ordered entry of judgment as requested in said motion,

IT IS SO ORDERED, ADJUDGED AND DECREED that defendant Peter A. Benson, M.D. is granted Judgment in his favor against plaintiff Isolina Picon, and that defendant Peter A. Benson, MD. have and recover from plaintiff Isolina Picon costs and disbursements incurred in the defense of this action pursuant to Code of Civil Procedure §§1032 and 1033.5.

Dated: NOV 23, 2010

/s/ JOHN L GRANDSAERT
JUDGE OF THE
SUPERIOR COURT

MICHAEL P. MURPHY,
COUNTY COUNSEL (SBN 83887)
By: John D. Nibbelin, Deputy (SBN 184603)
By: Glenn. M. Levy, Deputy (SBN 219029)
Hall of Justice and Records
400 County Center, 6th Floor
Redwood City, California 94063
Telephone: (650) 363-1965
Facsimile: (650) 363-4034
Email:jnibbelin@co.sanmateo.ca.us;
glevy@co.sanmateo.ca.us

Attorneys for Defendants
COUNTY OF SAN MATEO and
ROBERT FOUCRAULT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON Plaintiff, vs. COUNTY OF SAN MATEO; ROBERT FOUCRAULT, individual and as Coroner, PETER A. BENSON, M.D., individual and as Examiner; and DOES 1 TO 100,	Case No. C1V 467161 [PROPOSED] JUDGMENT IN FAVOR OF DEFENDANTS COUNTY OF SAN MATEO AND ROBERT FOUCRAULT

Defendants.

This Court, having on November 5, 2010, granted the Motion of Defendants County Of San Mateo and Robert Foucrault for Summary Judgment, and having ordered entry of judgment as requested in said motion, hereby orders as follows:

IT IS SO ORDERED, ADJUDGED AND DECREED that Defendants County of San Mateo and Robert Foucrault are granted Judgment in their favor against Plaintiff Isolina Picon, and that Defendants County of San Mateo and Robert Foucrault have and recover from Plaintiff Isolina Picon costs and disbursements incurred in the defense of this action pursuant to Sections 1032 and 1033.5 of the Code of Civil Procedure.

Dated: 11/22, 2010 /s/ John L. Grandsaert

HON. JOHN L.
GRANDSAERT
JUDGE OF THE
SUPERIOR COURT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

PETER A. BENSON, Petitioner, v. THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; ISOLINA PICON, Real Party in Interest.	A127285 (San Mateo County Super. Ct. No. CIV 467161)
COUNTY OF SAN MATEO, et al. Petitioners, v. THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; ISOLINA PICON, Real Party in Interest	A127305 (San Mateo County Super. Ct. No. CIV 467161) ORDER GRANTING PUBLICATION

THE COURT:

The requests for publication of this court's May 25, 2010 opinion are granted and it is hereby ordered that said opinion by published in the Official Reports.

Dated: _____

Ruvolo, P.J.

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

PETER A. BENSON
v.
THE SUPERIOR COURT OF
SAN MATEO COUNTY
ISOLINA PICON
A127285

COUNTY OF SAN MATEO et al.
v.
THE SUPERIOR COURT OF
SAN MATEO COUNTY
ISOLINA PICON
A127305

San Mateo County
Sup. Ct. No. CIV 467161

PEREMPTORY WRIT OF MANDATE

FROM THE PEOPLE OF THE STATE OF CALIFORNIA TO THE SUPERIOR COURT OF SAN MATEO COUNTY, GREETINGS:

Good cause appearing for the issuance of this peremptory writ of mandate,

WE DO COMMAND YOU, the Superior Court, to vacate your orders denying defendants' motions for summary judgment. Instead you shall issue new orders granting those motions.

Witness the Honorable Ignazio J. Ruvolo, Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division Four.

Attest my hand and the Seal of this Court on this 25th day of October, 2010.

Diana Herbert,
Clerk/Administrator
By: /s/ C. Hoo
Deputy Clerk

184 (2)

No. 10-1053

Supreme Court, U.S.
FILED
MAR 25 2011
OFFICE OF THE CLERK

In the
Supreme Court of the United States

ISOLINA PICON,

Petitioner,

v.

PETER A. BENSON, COUNTY OF SAN MATEO, ROBERT FOUCRAULT,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF FOR RESPONDENT PETER A. BENSON IN OPPOSITION

B. THOMAS FRENCH
Counsel of Record
JOSEPH C. GHARRITY
HASSARD BONNINGTON LLP
TWO EMBARCADERO CENTER
SUITE 1800
SAN FRANCISCO, CALIFORNIA 94111
(415) 288-9800
BTF@hassard.com

Counsel for Respondent
Peter A. Benson

March 25, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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Respondent, Peter A. Benson, respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner has attached to her petition for writ of certiorari copies of the following opinions and orders: (1) Opinion of the Court of Appeal of the State of California, First Appellate District, Division Four (Petn. App. 1-22); (2) Order of the Supreme Court of California Denying Petition for Review (Petn. App. 23); (3) Order of the Supreme Court of California extending time to file reply to answer to petition for review (Petn. App. 24); (4) Superior Court of the State of California Order After Remittitur, dated Nov. 5, 2010 (Petn. App. 25); (5) Superior Court of the State of California Judgment in Favor of Peter A. Benson, M.D., dated Nov. 23, 2010 (Petn. App. 26-27); (6) Superior Court of the State of California Judgment in Favor of Defendants County of San Mateo and Robert Foucrault, dated Nov. 22, 2010 (Petn. App. 28-29); (7) Court of Appeal of the State of California, First Appellate District, Division Four Order Granting Publication (Petn. App. 30-31); and (8) Peremptory Writ of Mandate dated Oct. 25, 2010, issued by the Court of Appeal of the State of California, First Appellate District, Division Four (Petn. App. 32-33).

Petitioner did not attach a copy of the United States District Court for the Northern District of California's Order Granting Defendants' Motion to Dismiss Plaintiff's Fourth Cause of Action; Remanding Case to San Mateo Superior Court, filed July 10, 2008. A copy of that order, which is unreported, is attached hereto as Respondent's Appendix ("Resp. App.").

JURISDICTION

Petitioner has not clearly identified the basis on which she invokes this court's jurisdiction. However, she argues she has been deprived of her rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Because Petitioner asks this court to review the decision of a California Court of Appeal, Respondent assumes Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1257(a).

The petition is untimely. The question whether Respondents deprived Petitioner of her rights under the Due Process Clause of the Fourteenth Amendment by retaining Joseph Picon's heart for further analysis as part of a lawful autopsy, without notice to and consent of his next of kin, was decided adversely to Petitioner by the United States District Court for the Northern District of California on July 10, 2008. Petitioner did not seek review of that order and the time for doing so has long since expired. The petition for a writ of certiorari with respect to that issue is therefore untimely and should be denied.

In addition, Petitioner's claim that Respondents violated her rights under the Due Process Clause of the Fourteenth Amendment was not properly raised in the state courts whose decisions Petitioner asks this court to review. Petitioner's Third Amended Complaint (the operative complaint) does not allege a violation of Petitioner's rights under the Due Process Clause. Furthermore, the San Mateo County Superior Court (the trial court) was not asked to and did not consider a claim that Petitioner's due process rights were violated. The California Court of Appeal for the

First Appellate District, whose decision is the subject of this petition, was not asked to and did not consider or rule on Petitioner's claim that her due process rights under the Fourteenth Amendment were violated. Petitioner's belated reference to an alleged due process violation in her reply brief to the California Supreme Court is insufficient to justify review by this court. Moreover, the reference to an alleged due process violation in that reply brief does not indicate whether it refers to due process rights under the California Constitution or under the United States Constitution.

Furthermore, Petitioner did not assert a claim against Peter A. Benson ("Dr. Benson") based upon an alleged violation of her due process rights. Dr. Benson was not named as a defendant until Petitioner filed her Second Amended Complaint, after the United States District Court had dismissed her Section 1983 claim and remanded the case to state court. Neither the Second Amended Complaint, in which Dr. Benson was first named as a defendant, nor the Third Amended Complaint included a claim alleging a violation of Petitioner's due process rights. As a result, there is no basis for review of a claim that Dr. Benson violated Petitioner's due process rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional and statutory provisions at issue in this matter are the following:

(1) The Fourteenth Amendment to the United States Constitution, Section 1, which provides in pertinent part as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

(2) California Government Code section 27491.4, subparagraph (a), which provides in pertinent part as follows:

> For purposes of inquiry . . . the coroner may, in his or her discretion, take possession of the body, . . . order it removed to a convenient place, and make or cause to be made a postmortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. . . .

(3) California Government Code section 27491.45, subparagraph (a), which provides in pertinent part as follows:

(1) The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training.

(2) Parts of the body retained pursuant to paragraph (1) may be released by the coroner to hospitals, medical educational research institutions, and law enforcement agencies for noncoroner training, educational, and research purposes, either upon consent of the decedent or other person, as specified in Section 7151 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents or that effort has been unsuccessful. . . .

STATEMENT OF THE CASE

Factual Background

Respondent believes the facts of the case are accurately summarized in the decision by the California Court of Appeal for the First Appellate District. [Petn. App. 1-22] In the interests of brevity, the facts as set forth in that decision are therefore incorporated herein by reference. However, it is

important to note it was undisputed that the autopsy in this case was lawfully performed. In addition, the San Mateo County Coroner, Respondent Robert Foucrault, is not a medical doctor. As a result, it was necessary for the County of San Mateo to contract with one or more licensed physicians, such as Dr. Benson, to perform autopsies for the Coroner's Office. Finally, contrary to the statement in the petition, Nicholas Picon's heart never left the San Mateo County Coroner's custody and, in particular, it was never sent to Stanford University.

Procedural History

Petitioner filed the original Complaint in this matter in San Mateo County Superior Court on October 24, 2007. The Complaint named the County of San Mateo and Robert Foucrault, individually and as Coroner, as defendants, and alleged three causes of action: (1) Denial of Quasi-Property Right to Control the Disposition of the Remains of a Deceased Person; (2) Breach of Mandatory Duty Government Code § 815.6; and (3) Negligent Infliction of Emotional Distress.

On January 29, 2008, Petitioner filed a First Amended Complaint. It set forth essentially the same causes of action as the original Complaint, but added a Fourth Cause of Action asserting a claim for "Unconstitutional Deprivation of Property Under 42 U.S.C.S. § 1983," alleging the County of San Mateo and Robert Foucrault, individually and as Coroner, had violated Petitioner's constitutional right to due process under the Fourteenth Amendment to the United States Constitution. The defendants, County of San Mateo and Robert Foucrault, then removed the

case to the United States District Court for the Northern District of California. On July 10, 2008, The Honorable Samuel Conti, Judge, of United States District Court for the Northern District of California, dismissed the Fourth Cause of Action with prejudice and remanded the case to the San Mateo County Superior Court for further proceedings on the state law causes of action. [Resp. App.]

On September 12, 2008, Petitioner filed a Second Amended Complaint alleging only two causes of action: (1) Denial of Quasi-Property Right to Control the Disposition of the Remains of a Deceased Person; and (2) Negligence. The Second Amended Complaint named as defendants the County of San Mateo, Robert Foucrault, individually and as Coroner, and, for the first time, Dr. Peter Benson "individual & as Examiner."

On January 13, 2009, Petitioner filed a Third Amended Complaint. It alleged the same two causes of action as the Second Amended Complaint and named as defendants the County of San Mateo, Robert Foucrault, individually and as Coroner, and Dr. Peter Benson "individual & Examiner." The Third Amended Complaint was the operative pleading at the time of the summary judgment motions that were the subject of the decision by the California Court of Appeal to which this petition relates.

On October 9, 2009, Dr. Benson filed his motion for summary judgment. The motion was heard and denied by the San Mateo County Superior Court on December 21, 2009. Dr. Benson sought review of the order denying his motion for summary judgment by way of a petition for a writ of mandate, which was filed

on January 12, 2010. On May 25, 2010, the California Court of Appeal, First Appellate District, Division Four, issued its decision granting Dr. Benson's petition. That is the decision (Petn. App. 1-22) Petitioner seeks to have this court review.[1] On June 22, 2010, the Court of Appeal issued its order granting publication of its decision. [Petn. App. 30-31]

After the Court of Appeal decision was issued, Petitioner sought review by the California Supreme Court, which was denied. [Petn. App. 23 and 24] Thereafter, on October 25, 2010, the Court of Appeal issued its remittitur and its peremptory writ of mandate requiring the San Mateo County Superior Court to vacate its order denying Dr. Benson's motion for summary judgment and enter a new order granting that motion. [Petn. App. 32-33]

In accordance with the Court of Appeal's peremptory writ of mandate, on November 5, 2010, the San Mateo County Superior Court entered an order vacating its order denying Dr. Benson's motion for summary judgment and entering a new order granting that motion. [Petn. App. 25] Subsequently, on November 23, 2010, the San Mateo County Superior Court entered judgment in favor of Dr. Benson and against Petitioner, Isolina Picon. [Petn. App. 26-27]

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[1] A motion for summary judgment or, in the alternative, for summary adjudication, filed by the County of San Mateo and Robert Foucrault was also heard and denied on December 21, 2009. The County and Coroner Foucrault also filed a petition for a writ of mandate seeking review of the Superior Court's denial of their motion. The Court of Appeal consolidated Dr. Benson's writ petition with that filed by the County and Coroner Foucrault and issued a single decision on May 25, 2010.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition is Untimely

When Petitioner filed her First Amended Complaint in state court, she added a cause of action asserting a claim for damages under 42 U.S.C. § 1983.[2] [Petn. 4] At that point the County of San Mateo and Coroner Foucrault removed the case to the United States District Court for the Northern District of California. [Petn. 4; see Resp. App. 2a] The County and Coroner Foucrault then filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. [See Resp. App. 2a]

On July 10, 2008, the motion to dismiss filed by San Mateo County and Coroner Foucrault was granted as to the cause of action asserting a claim for damages under Section 1983. [Resp. App. 2a, 11a-12a] The District Court concluded: "Regardless of whether the alleged property interest in question is the right to possess the deceased son's heart or the right to determine the disposition of the deceased son's remains, Plaintiff's claim fails." [Resp. App. 7a] The District Court therefore held: "Because Plaintiff has failed to identify a property interest protected by the Fourteenth Amendment, she has failed to satisfy the first element of a section 1983 claim. Even if the property interests Plaintiff claims were protected, however, she has failed to allege facts sufficient to show that she was deprived of those interests.

---

[2] Dr. Benson had not yet been named as a defendant when Petitioner filed her First Amended Complaint.

Plaintiff's section 1983 claim is therefore dismissed." [Resp. App. 11a] Accordingly, the District Court dismissed, with prejudice, Petitioner's Fourth Cause of Action for unconstitutional deprivation of property under 42 U.S.C. § 1983, and then remanded the case to the San Mateo County Superior Court for further proceedings with respect to the remaining claims. [Resp. App. 11a-12a]

Although remand orders generally are not reviewable (28 U.S.C. § 1447(d)), where a district court makes a substantive decision on the merits that is followed by a remand to state court, the dismissal is reviewable. *Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-277 (9th Cir. 1984). Otherwise, the dismissal would be immune from review. *Id.*

If an order by a United States District Court is reviewable, a party normally must seek review of the order within 30 days after it is entered. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). Petitioner did not seek review of the District Court's order dismissing her Section 1983 claim within 30 days after it was entered, and the time for doing so has not been extended. Her effort at this point to seek review of her claim that the defendants deprived her of a property right in violation of the Due Process Clause of the Fourteenth Amendment is therefore untimely.

II. Petitioner Failed to Properly Raise Her Due Process Claims in the Courts Whose Decisions She Asks This Court to Review

Petitioner argues she raised her due process claim at the trial court level by adding a cause of action for damages under 42 U.S.C. § 1983 to her First Amended Complaint. [Petn. 6] However, as noted, that claim was dismissed with prejudice by the United States District Court and Petitioner did not seek review of that order. Furthermore, Dr. Benson had not yet been named as a party when that claim was dismissed, and Petitioner never attempted to plead such a claim against Dr. Benson.

Petitioner has not suggested she argued in opposition to Dr. Benson's motion for summary judgment that the motion should be denied because, if granted, it would result in a denial of due process under the Fourteenth Amendment. Nor has Petitioner suggested she made such an argument to the California Court of Appeal in opposition to Dr. Benson's petition for a writ of mandate. It is clear from the Court of Appeal's decision granting Dr. Benson's petition (Petn. App. 1-22) that the court did not consider or decide any claim that issuance of the writ would result in a denial of due process under the Fourteenth Amendment.

Other than adding the cause of action for damages under 42 U.S.C. § 1983 to her First Amended Complaint, the only point at which Petitioner suggests she raised her due process claim in the courts whose decision she asks this court to review was in her reply to the defendants' opposition to her petition for review by the California Supreme Court. [Petn. 7] At that

point it was far too late to properly raise the due process claim for purposes of subsequent review by this court. *E.g., Zadig v. Baldwin*, 166 U.S. 485, 488, 17 S.Ct. 639, 640, 41 L.Ed. 1087 (1897); *New York Cent. & H.R.R. Co. v. City of New York*, 186 U.S. 269, 272-273, 22 S.Ct. 916, 916, 46 L.Ed. 1158 (1902).

Finally, Petitioner has failed to demonstrate she made clear in her reply brief to the California Supreme Court that she was claiming a deprivation of due process under the Fourteenth Amendment to the United States Constitution, as opposed to her right to due process under article 1, section 7 of the California Constitution. [See Petn. 7] Where, as here, the state Constitution also includes a Due Process Clause and the petitioner, in asserting in the court below that he or she has been deprived of a property right without due process of law, fails to make reference to the United States Constitution as the source of that right, there is no basis for invoking the jurisdiction of the United States Supreme Court. *Bowe v. Scott*, 233 U.S. 658, 664-665, 34 S.Ct. 769, 771, 58 L.Ed. 1141 (1914).

III. Petitioner Was Not Deprived of Due Process In Violation of the Fourteenth Amendment

In an effort to justify her petition for writ of certiorari, Petitioner has tried mightily to characterize the Court of Appeal decision in this case as depriving her of due process rights under the Fourteenth Amendment. In reality, however, she is simply asking this court to review and reverse the California Court of Appeal's determination that, under state law, Dr. Benson did not have a duty to notify and obtain Petitioner's consent before retaining Nicholas Picon's

heart for further examination to determine the cause of his death.

A. The failure to obtain Petitioner's consent before retaining Nicholas Picon's heart did not deprive Petitioner of a property right in violation Due Process Clause of the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that a state must not "deprive any person of life, liberty, or property, without due process of law." Thus, in order to state a claim for deprivation of a property interest without due process in violation of the Fourteenth Amendment, the plaintiff must prove three elements: (1) the existence of a property interest protected by the Constitution, (2) a deprivation of the interest by the government, and (3) a lack of required process. *See*, e.g., *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

The United States Constitution protects rather than creates property interests. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 163-164, 118 S.Ct. 1925, 1930, 141 L.Ed. 174 (1998). As a result, the existence of a property right is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Id.*, quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 548 (1972). Thus, the existence of a protected property interest is normally a question of state law. *E.g.*, *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

In the instant case, Petitioner has never clearly articulated the "protected property interest" of which she claims she was deprived. In fact, the California courts have long held "there is no right of property as such in the dead body of a human being." *Gray v. S. Pac. Co.*, 21 Cal.App.2d 240, 246, 68 P.2d 1011 (1937); *see also*, *Enos v. Snyder*, 131 Cal. 68, 69, 63 P. 170 (1900). On the other hand, the courts have held a deceased person's next of kin have a limited "quasi-property right" to temporary custody of the body for purposes of burial. *Huntly v. Zurich Gen. Accident & Liab. Ins. Co.*, 100 Cal.App. 201, 208, 280 P. 163 (1929); *see also*, *Gray v. S. Pa. Co.*, 21 Cal.App.2d 240, 246, 68 P.2d 1011 (1937). Unlawful interference with that "quasi-property right" has been held to give rise to a cause of action in tort. *E.g.*, *Sinai Temple v. Kaplan*, 54 Cal.App.3d 1103, 1110-1112, 127 Cal.Rptr. 80 (1976) .

It is undisputed that the autopsy performed by the Coroner's Office on Nicholas Picon's body was lawful. When a body on which a lawful autopsy has been performed is released for burial, the Coroner is authorized to retain such body parts and tissues as may, in the Coroner's opinion, be necessary or advisable to his or her inquiry into the case, for the verification of his or her findings, or for scientific investigation or training. Cal. Govt. Code §§ 27491.4(a) and 27491.45(a)(1). Thus, to the extent a decedent's next of kin may have limited "quasi-property right" under California law to temporary custody of the body for purposes of burial, he or she does not have a protected property interest in body parts and tissues that are retained by the Coroner for the purposes specified in the aforementioned statutes.

The gravamen of Petitioner's complaint appears to be that the Coroner's Office did not obtain her consent before retaining Nicholas Picon's heart when his body was released for burial. Petitioner has failed to cite any authority suggesting the Coroner had an obligation to do so, much less that she was deprived of a protected "property right" by his failure to do so. On the contrary, the California Court of Appeal correctly concluded, as a matter of state law, that California Government Code sections 27491.4(a) and 27491.45(a)(1) (unlike California Government Code section 27491.45(a)(2)) do not require the Coroner to notify or obtain consent from the decedent's next of kin before retaining body parts or tissues to determine the cause of death or for scientific investigation or coroner training. [Petn. App. 11] As a result, Petitioner has failed to demonstrate the existence of a protected property interest of which she was allegedly deprived.

Finally, the decision of the New York Supreme Court, Appellate Division, in *Shipley v. City of New York*, 80 A.D.3d 171, 908 N.Y.S.2d 425 (2010) does not support Petitioner's claim that she was deprived of a property right without due process. In *Shipley* the court simply held the medical examiner had a duty, under the state (New York) law right of seplucher, to inform the next of kin, when a body is released for burial, that a part of the body is being retained. 80 A.D.3d at 179, 908 N.Y.S.2d at 432. *Shipley* did not hold the medical examiner had deprived the decedent's next of kin of a protected property right by failing to do so. In fact, the court emphasized this point by acknowledging the decision in *Albrecht v. Treon*, 118 Ohio St. 3d 348, 889 N.E.2d 120 (2008), but specifically distinguishing it on the ground it was based on a due process analysis of the next of kin's property interest

in a decedent's bodily organs rather than on a duty imposed by New York law under the right of sepulcher. 80 A.D.3d at 178, 908 N.Y.S.2d at 431.

B. Petitioner's other due process claims are without merit

Petitioner alleges several other due process violations in support of her petition for writ of certiorari. None of those claims has merit.

Petitioner argues she was deprived of due process by the California Court of Appeal's interpretation of California Government Code sections 27491.4(a) and 27491.45(a) together in determining that neither Dr. Benson, San Mateo County, nor Coroner Foucrault had a duty to notify Petitioner and obtain her consent before retaining Nicholas Picon's heart for further examination in order to determine the cause of death. [Petn. 15-16] On the contrary, one of the fundamental rules of statutory construction is that when statutes are *in pari* materia, they should be construed together as one statute. *City of Huntington Beach v. Bd. of Admin.*, 4 Cal.4th 462, 468, 14 Cal.Rptr.2d 514, 841 P.2d 1034 (1992). "In this regard, all parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." *Id.*

The phrase "*in pari* materia" means "'[o]f the same matter; on the same subject' . . ." *Altaville Drug Store, Inc. v. Emp't Dev. Dep't*, 44 Cal.3d 231, 236, fn. 4, 242 Cal.Rptr. 732, 746 P.2d 871 (1988). Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons [or] things, or have the same purpose or object. *Walker*

v. Superior Court, 47 Cal.3d 112, 124, fn. 4, 253 Cal.Rptr. 1, 763 P.2d 852 (1988). California Government Code sections 27491.4(a) and 27491.45(a) clearly are *in pari materia*, and interpreting them together is entirely appropriate. It certainly does not constitute a denial of due process.

Petitioner's claim that she was deprived of due process because the California Court of Appeal failed to undertake a *de novo* review of the San Mateo County Superior Court's order denying the defendants' motions for summary judgment (Petn. 7-10) is also without merit. It is readily apparent from the Court of Appeal's decision (Petn. App. 1-22) that it did in fact undertake a *de novo* review of the Superior Court's rulings on those motions. Furthermore, as Dr. Benson understands this argument, it applies only to the Court of Appeal's decision with respect to San Mateo County and Coroner Foucrault. As a result, this argument does not support the petition for writ of certiorari with respect to Dr. Benson.

In what may be a related contention, Petitioner claims the Court of Appeal improperly based its decision in favor of San Mateo County and Coroner Foucrault on arguments raised only by Dr. Benson. [Petn. 9-10] Dr. Benson believes this claim is unfounded, but in any event it apparently relates only to San Mateo County and Coroner Foucrault. As a result, it does not support the petition for writ of certiorari with respect to Dr. Benson.

Petitioner also suggests the California Court of Appeal's conclusion that, under California law, a Coroner is authorized to delegate decisions regarding retention of body parts removed during autopsy for

further examination for the purpose of determining or confirming the cause of death to an independent contractor physician who is retained for the purpose of performing autopsies somehow involves a denial of due process under the Fourteenth Amendment. [Petn. 13-15] Petitioner has cited no authority for this proposition, and Dr. Benson believes there is none. In any event, the existence of such authority is strictly an issue of state law and does not support issuance of a writ of certiorari in this matter.

Finally, as Dr. Benson understands the petition, Petitioner claims she was somehow denied due process under the Fourteenth Amendment when the California Court of Appeal reviewed the Superior Court's order denying Dr. Benson's motion for summary judgment and, upon determining that Petitioner had failed to raise a triable issue of material fact, issued a writ of mandate requiring the Superior Court to vacate its order denying that motion and enter a new order granting the motion. [Petn. 16-17] This procedure is specifically authorized by state statute, California Code of Civil Procedure section 437c, subparagraph m(1). Furthermore, as noted in *Scheiding v. Dinwiddie Constr. Co.*, 69 Cal.App.4th 64, 81 Cal.Rptr.2d 360 (1999): "California and federal courts long ago agreed that nothing in the summary judgment procedure is inherently unconstitutional." 69 Cal.App.4th at 70-71, 81 Cal.Rptr.2d at 364, citing *Bank of Am., etc. v. Oil Well S. Co.*, 12 Cal.App.2d 265, 270, 55 P.2d 885 (1936), and *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902). Numerous federal courts have held that where no genuine issue of material fact exists, the court may, without violating Seventh Amendment rights, grant summary judgment pursuant to Rule 56 of the Federal

Rules of Civil Procedure. *E.g., Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815, 819 (2d Cir. 1977) *aff'd*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957). Having determined that Petitioner failed to raise a triable issue of material fact by her opposition to Dr. Benson's motion for summary judgment, issuance of a writ of mandate requiring the trial court to vacate its order denying that motion and enter a new order granting the motion did not violate Petitioner's rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

B. THOMAS FRENCH
Counsel of Record
JOSEPH C. GHARRITY
HASSARD BONNINGTON LLP
Two Embarcadero Center, Suite 1800
San Francisco, California 94111
Tel: (415) 288-9800
Fax: (415) 288-9801
BTF@hassard.com

Counsel for Respondent,
Peter A. Benson, M.D.

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-08-766 SC

[Filed July 10, 2008]

ISOLINA PICON,	)
	)
Plaintiff,	)
	)
v.	)
	)
COUNTY OF SAN MATEO, ROBERT FOUCRAULT, Individual and as Coroner, SAN MATEO COUNTY,	)
	)
Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH CAUSE OF ACTION; REMANDING CASE TO SAN MATEO SUPERIOR COURT

I. INTRODUCTION

Isolina Picon ("Plaintiff" or "Picon") sued the County of San Mateo and County Coroner, Robert Foucrault ("Coroner," collectively "Defendants"), in San Mateo County Superior Court, alleging that after

her son died of natural causes, the Coroner's office returned the body to her without informing her that they had retained her son's heart. Picon brought causes of action for breach of the right to control the disposition of the remains of a deceased person, breach of a mandatory duty, negligent infliction of emotional distress, and denial of due process under 42 U.S.C. § 1983. See Supp. Notice of Removal, Docket No. 3, Ex. A-9 ("FAC").[1] Defendants removed the case to this Court pursuant to 28 U.S.C. § 1441 on the grounds that the section 1983 claim is within the Court's original jurisdiction. See Notice of Removal, Docket No. 1.

Now before the Court is Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Motion"). Docket No. 9. Picon filed an Opposition and Defendants filed a Reply. Docket Nos. 14, 15. Having considered the parties' arguments in full, the Court hereby GRANTS Defendants' Motion with respect to the Fourth Cause of Action. The Court REMANDS the matter to the San Mateo County Superior Court for consideration of the remaining causes of action.

II. BACKGROUND

According to the FAC, Plaintiff's son Nicholas Picon died of natural causes on October 25, 2006. He was 23 years old. The Coroner conducted an autopsy on October 26, 2006. After the autopsy, the Coroner retained Nicholas Picon's heart and released the

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[1] The complaint on which Defendants based removal was the First Amended Complaint in the state court proceedings.

remainder of Nicholas's body to the funeral home. According to the autopsy report, the Coroner conducted an additional examination of the heart on October 29. See FAC Ex. A at 3, 5 ("Report").

Plaintiff had a funeral for her son on October 30, 2006. Following the funeral, Plaintiff learned for the first time that the Coroner had retained the heart. On November 13, Plaintiff requested a copy of the Report. After reviewing the Report, Plaintiff contacted the district attorney and the Coroner. Plaintiff repeatedly requested that her son's heart be returned. On November 21, the Coroner returned the heart to Plaintiff.

Plaintiff alleges that by retaining her son's heart for the period between October 26 and November 21, 2006, the Coroner denied her a quasi-property right to control the disposition of the remains of her son, breached a mandatory duty, negligently inflicted emotional distress, and deprived her of her property interest in the remains of her son without due process.

III. PROCEDURAL ISSUES

Before addressing the merits of Defendants' Motion, the Court must consider procedural concerns raised in Plaintiff's Opposition. Plaintiff asserts that Defendants' Motion should be denied because Defendants failed to attach a proposed order, in violation of Civil Local Rule 7-2(c), and because Defendants did not provide a supporting declaration, in violation of Civil Local Rule 7-5(a). Failure to comply with the Civil Local Rules may be grounds for the imposition of any authorized sanction. See Civ. L.R. 1-4.

An affidavit or declaration is only required where the moving party makes factual contentions or offers documentary evidence in support of its motion. Civ. L.R. 7-5(a). Defendants brought their Motion pursuant to Federal Rule of Civil Procedure 12(b)6), arguing that, even if the allegations of the FAC are true, Plaintiff has failed to state a claim on which relief can be granted. The Court resolves the Motion on the face of the pleadings; as such, no affidavit or declaration was necessary.

Unless excused by the Court, a motion must be accompanied by a proposed order. Civ. L.R. 7-2(c). Defendants did not provide a proposed order until they submitted their reply brief. See Docket No. 16. As the Motion makes clear that the relief Defendants seek is dismissal of all claims, Plaintiff suffered no prejudice by the delayed submission of a proposed order. The purpose of the Civil Local Rules is to "promote the just, efficient, speedy and economical determination of every action and proceeding." Civ. L.R. 1-2(b). The delayed submission did not interfere with this purpose, so the Court sees no reason to impose the severe sanction of denying the Motion solely on this basis.[2]

IV. LEGAL STANDARD

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint. Dismissal pursuant to Rule 12(b)(6) is appropriate if

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[2] The Court notes that Plaintiff's entire Opposition was submitted with formatting in violation of Civil Local Rule 3-4(c)(2). Were the Court to require the strict adherence to the Civil Local Rules that Plaintiff advocates, Plaintiff's brief would be stricken.

the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). When evaluating a motion to dismiss, the court accepts the facts as stated by the nonmoving party and draws all reasonable inferences in its favor. See Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). Furthermore, the court must assume that all general allegations "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994). At the pleading stage, the plaintiff "need only show that the facts alleged, if proved, would confer standing upon him." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir. 2003).

When considering a motion to dismiss, the court is generally limited to the allegations in the complaint, without extrinsic evidence. See, e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). However, where another document is attached to the complaint, as it was here, the court may treat that document as part of the complaint and consider it when ruling on a motion to dismiss. See id.; Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). The Court therefore considers the contents of the Report, attached to the FAC as an exhibit, part of Plaintiff's factual allegations.

V. DISCUSSION

Plaintiff's Fourth Cause of Action is for deprivation of a property right without due process, in violation of

the Fourteenth Amendment. Section 1983 of Title 42 creates a cause of action for such deprivation:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. To prevail on an action brought under section 1983, a plaintiff must prove three elements: (1) a property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of required process. See Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). The existence of a protected property interest is a question of state law. Id.

Plaintiff's attempts to identify the protected property interest at issue are unsuccessful. In the FAC, Plaintiff states:

> Here, the San Mateo County Coroner deprived plaintiff Isolina Picon of the heart of her deceased son for nearly thirty days. The actions of the County Coroner caused a deprivation of plaintiffs' property without due process of law in violation of the Fourteenth Amendment. The heart was retained without the knowledge of the plaintiff and without an attempt to notify

> her and request consent to retain the organ for scientific purposes.

FAC at 14-15. Plaintiff barely even addresses the section 1983 claim in her Opposition, other than this brief discussion:

> Here, the entire heart organ of the plaintiffs [sic] deceased son was removed and retained by the Coroner of the County of San Mateo which resulted in her being deprived of the right to determine the disposition of his remains at burial. Since, the law recognizes the quasi property right of the remains of a deceased person the second prong has been sufficiently plead.

Opp'n at 9-10.

Regardless of whether the alleged property interest in question is the right to possess the deceased son's heart or the right to determine the disposition of the deceased son's remains, Plaintiff's claim fails. Plaintiff relies on the Ninth Circuit decision in Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002). See FAC at 13; Opp'n at 6. In Newman, the coroner had removed a deceased child's corneas without the parents' consent. Newman, 287 F.3d at 788. The parents brought suit under section 1983, claiming that their right to possess the body of a deceased family member was a property interest protected by the Fourteenth Amendment. Id. The court held that the "parents had property interests in the corneas of their deceased children protected by" the Fourteenth Amendment. Id. at 796.

To the extent Plaintiff's claim is based on a property interest in the heart itself, Newman is distinguishable. The court's conclusion in that case cannot be extended to body parts other than corneas, as the court based its decision on California Government Code section 27491.47(a), which at the relevant time, authorized coroners to "remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody, if . . . the coroner has no knowledge of objection to the removal . . . ." See id. at 788 n.1 (quoting Cal. Gov't Code § 27491.47(a))(omission in original), 795. The court acknowledged more than once that the provisions governing the disposition of corneas were different from those governing the disposition of other body parts. See id. at 795 n.11, 796, 798 n.15 (distinguishing Cal. Gov't Code § 24791 and Cal. Health & Safety Code § 7151.5). The court found that the statute conferred a property interest in the corneas by requiring the coroner to seek consent, and then simultaneously deprived the plaintiffs of that interest without adequate process, by allowing the coroner to proceed if he is unaware of objections when he has not actually sought consent. See id. at 799. Here, contrary to Plaintiff's assertion, nothing in the statute creates a property interest in decedent's heart. California Government Code section 27491.4(a), which authorizes coroners to perform autopsies, provides in part:

> The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. No person may be present during the

> performance of a coroner's autopsy without the express consent of the coroner.

Cal. Gov't Code § 27491.4(a). Unlike the provision governing corneas in Newman, this statute vests sole discretion with the coroner, with no allowance for objection. Newman only found a property interest because of the allowance for objection; as such allowance is not present here, this statute cannot be said to confer a property right. See Newman, 287 F.3d at 799.

Plaintiff also invokes California Government Code section 27491.45(a). That statute vests the coroner with the right to retain body parts for scientific investigation and training:

> The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training.

Cal. Gov't Code § 24791.45(a)(1). Like section 27491.4(a), this statute gives the coroner full discretion without the requirement of notice or opportunity to object, and therefore does not create a property interest. See Newman, 287 F.3d at 799. Consent is only necessary if the coroner releases retained body parts to "hospitals, medical educational

research institutions, [or] law enforcement agencies for noncoroner training, educational, and research purposes . . . ." Cal. Gov't Code § 24791.45(a)(2). At most, this creates a limited property interest in the disposition of tissues released to third-parties. It does not, however, create the property interest Plaintiff claims.

Even assuming, arguendo, that Plaintiff has established a property interest, she has not alleged facts showing a deprivation of that interest. If the claimed interest is in the heart itself, Plaintiff's reliance on Newman is misplaced. In that case, the corneas were donated to non-profit eye banks for transplant. Newman, 287 F.3d at 795. By contrast, Plaintiff here recovered the heart after asking Defendants for it. To the extent the property interest is in disposition of Plaintiff's son's remains, the facts alleged demonstrate that the Coroner acted within his statutory authority, so Plaintiff had no property interest. If the Coroner retained the heart for either further investigation of the cause of death or for verification of his findings, he was authorized to do so by California Government Code section 24791.4(a). The Report shows that after reaching the initial conclusion regarding the cause of death on October 26, the Coroner continued to investigate the matter on October 29. Even Plaintiff's allegation that the Coroner had transferred the heart to Stanford for study does not trigger a notice obligation, as California Government Code section 27491.45(a)(1) authorizes him to "employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training."

Because Plaintiff has failed to identify a property interest protected by the Fourteenth Amendment, she has failed to satisfy the first element of a section 1983 claim. Even if the property interests Plaintiff claims were protected, however, she has failed to allege facts sufficient to show that she was deprived of those interests. Plaintiff's section 1983 claim is therefore dismissed.

VI. JURISDICTION

Of the four causes of action in the FAC, the only one providing a basis for this Court's jurisdiction on removal was the section 1983 claim. See Notice of Removal; 28 U.S.C. § 1441(c). Because that claim has been dismissed, the Court declines to exercise its supplemental jurisdiction over the remaining state law claims. See 28 U.S.C. § 1367(c); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1189 (9th Cir. 2001) ("Under 28 U.S.C. § 1367(c)(3), a district court has discretion to elect not to exercise supplemental jurisdiction over state claims if it has dismissed the federal claims over which it had original jurisdiction.").

VII. CONCLUSION

For the reasons set forth above, the Court concludes that Plaintiff has failed to allege facts sufficient to state a claim under 42 U.S.C. § 1983. The Court therefore GRANTS Defendants' Motion with respect to the Fourth Cause of Action and ORDERS as follows:

1. Plaintiff's Fourth Cause of Action for unconstitutional deprivation of property under

42 U.S.C. § 1983 is DISMISSED WITH PREJUDICE.

2. This matter is REMANDED to the San Mateo County Superior Court for further action on the remaining claims.

IT IS SO ORDERED.

Dated: July 10, 2008

/s/ Samuel Conti
UNITED STATES DISTRICT JUDGE

184 (3)

No. 10-1053

Supreme Court, U.S.
FILED
APR 15 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ISOLINA PICON,

Petitioner,

v.

PETER A. BENSON, COUNTY OF SAN MATEO, ROBERT FOUCRAULT, et al.,

Respondents.

On Petition For Writ of Certiorari To The California Court of Appeals

REPLY IN SUPPORT OF WRIT OF CERTIORARI

Ayanna L. Jenkins Toney
Counsel of Record
Law Offices of Ayanna L. Jenkins Toney
225 Bush Street, 16th Floor
San Francisco, CA 94104
(415) 464-4974

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I. THE OPINION REACHED BY THE CALIFORNIA COURT OF APPEALS DOES NOT REST ON "ADEQUATE AND INDEPENDENT" STATE GROUNDS

The issue is whether the precedent setting opinion issued by the California Court of Appeals rests on "adequate and independent" grounds where the method of statutory interpretation combined two California statues, did not follow *de novo* review, altered the plain language *and* ignored the legislative history of the existing statutes. This court has held:

> The adequate and independent state ground doctrine states that when a litigant petitions the U.S. Supreme Court to review the judgment of a state court which rests upon both federal and non-federal (state) law, the U.S. Supreme Court does not have jurisdiction over the case if the state ground is (1) "adequate" to support the judgment, and (2) "independent" of federal law. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983) (It is, of course, incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment. (internal quotation marks omitted)); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

I. THE OPINION REACHED BY THE CALIFORNIA COURT OF APPEALS DOES NOT REST ON "ADEQUATE AND INDEPENDENT" STATE GROUNDS

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Here the method of statutory interpretation employed by the California Court of Appeals in this precedent setting decision was arbitrary, unforseen, and deprived the Petitioner of her constitutionally protected rights of due process, therefore, it was not "adequate." Additionally, the opinion does not contain a plain statement that the decision was based "independently" on state law. Conversely, the opinion nearly quotes verbatim the opinion issued by the United States District Court for the Northern District of California, which dismissed with prejudice the Petitioner's Fourteenth Amendment claim of damages under 42 U.S.C. § 1983 on July 10, 2008. [Resp. App. 12a] Whereas here the record clearly reflects the fact that the judgment entered by the California Court of Appeals used federal law to guide their application of state law and, to provide the actual basis for the decision that was reached, this court is required to reach the case on the merits. *Texas* v. *Brown*, 460 U. S. 730, 732-733, n. 1 (1983) (plurality opinion). Cf. *South Dakota* v. *Neville*, 459 U. S. 553, 569 (1983) (STEVENS, J., dissenting)

A. The Holding in the Above Referenced Case is Not "Adequate"

The issue is whether the California Court of Appeals employed a method of statutory interpretation that was arbitrary, unforseen, and deprived the Petitioner her constitutionally protected right to vindicate her claims of wrongdoing or imposed an undue burden on her ability to protect her rights. This court has held:

> The "adequacy" prong primarily focuses on state court dismissals of federal claims on state procedural grounds, as procedural requirements are by definition logically antecedent. Antecedent state-law grounds (i.e., state rules of procedure) are adequate to support a judgment unless they (1) are arbitrary, unforeseen, or otherwise deprive the litigant of a reasonable opportunity to be heard, *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958), or (2) impose an undue burden on the ability of litigants to protect their federal rights, *Felder v. Casey*, 487 U.S. 131, 138 (1988).

Here it is obvious that the judment was not "adequate." Since the Petitioner relied on the plain language and legislative history of California Government Code Sections 27491 and 27491.45 when drafting her complaint, the opinion issued by the California Court of Appeals extinguished the Petitioner's rights to vindicate her claims without notice which is a denial of post deprivation due process. Further, combining two statutes, not following *de novo* review, *and* ignoring the plain language and legislative history of the the two statutes was an arbitrary, unforseen act by the judiciary that deprived the Petitioner of due process and imposed an undue burden on the Petitioner to defend against the peremptory writs.

California Government Code Section 27491 reads:

> Authority to take possession of body in sudden infant death syndrome; Exhumation; Medical findings; Retention of tissues; Right to attend coroner's autopsy; Effect of Uniform Anatomical Gift Act upon performance of autopsy.
>
> (a) For purposes of inquiry the coroner shall, within 24 hours or as soon as feasible thereafter, where the suspected cause of death is sudden infant death syndrome and, in all other cases, the coroner may, in his or her discretion, take possession of the body, which shall include the authority to exhume the body, order it removed to a convenient place, and make or cause to be made a post-mortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and

this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. No person may be present during the performance of a coroner's autopsy without the express consent of the coroner.

(b) In any case in which the coroner knows, or has reason to believe, that the deceased has made valid provision for the disposition of his or her body or a part or parts thereof for medical or scientific purposes in accordance with Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code, the coroner shall neither perform nor authorize any other person to perform an autopsy on the body unless the coroner has contacted or attempted to contact the physician last in attendance to the deceased. If the physician cannot be contacted, the coroner shall then notify or attempt to notify one of the following of the need for an autopsy to determine the cause of death: (1) the surviving spouse; (2) a surviving child or parent; (3) a

> surviving brother or sister; (4) any other kin or person who has acquired the right to control the disposition of the remains. Following a period of 24 hours after attempting to contact the physician last in attendance and notifying or attempting to notify one of the responsible parties listed above, the coroner may perform or authorize the performance of an autopsy, as otherwise authorized or required by law.
>
> (c) Nothing in this section shall be deemed to prohibit the discretion of the coroner to conduct autopsies upon any victim of sudden, unexpected, or unexplained death or any death known or suspected of resulting from an accident, suicide, or apparent criminal means, or other death, as described in Section 27491.

California Government Code Section 27491.45 reads:

> Retention of tissues removed at autopsy; Removal of parts for transplant, or therapeutic, or scientific purposes
>
> (a)(1) The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a

coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training.

(2) Parts of the body retained pursuant to paragraph (1) may be released by the coroner to hospitals, medical educational research institutions, and law enforcement agencies for noncoroner training, educational, and research purposes, either upon consent of the decedent or other person, as specified in Section 7151 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents or that effort has been unsuccessful. A reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying

the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151 of the Health and Safety Code.

(b) The coroner may, in his or her discretion, allow removal of parts of the body by a licensed physician and surgeon or trained transplant technician for transplant, or therapeutic, or scientific purposes pursuant to Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code, **only if the following conditions are met:**

(1) The provision of the part will not unnecessarily mutilate the body or interfere with the autopsy.

(2) The decedent or other person, as specified in Section 7151 of the Health and Safety Code, has consented to the provision of the part, as prescribed by Section 7154 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents, or that effort has been unsuccessful. A

reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151 of the Health and Safety Code. In obtaining this gift, the coroner shall notify the donor of the specific part or parts requested and shall obtain the donor's informed consent, as provided in Section 7150.5 or 7151 of the Health and Safety Code.

(c) Nothing in this section shall be construed as limiting any right provided for in Section 7152 of the Health and Safety Code.

(d) For purposes of this section, "trained transplant technician" means a person who has completed training in tissue removal for transplant or therapeutic, or scientific purposes, which the coroner determines to be adequate for the purposes.

It is evident that combining the two statutes invalidates the state procedural requirements regarding retention of entire organs for scientific purposes without the express consent of the next of kin. Furthermore California Government Code Section 27491.45 (b)(2), unequivocally states that the coroner may allow a licensed physician and surgeon such as the Respondent Dr. Benson to remove and retain entire organs for scientific purposes *only* if the the next of kin has consented which demonstrates the statutory limitation and distinction between the coroner and the physician. This is the crux of the Petitioner's complaint in which she has maintained that her protected property rights to determine the disposition of the remains of her deceased son were violated when the Respondent Coroner Robert Foucrault allowed the removal and retention of the entire heart organ by the Respondent Dr. Benson without her knowledge and consent. Thus when the California Court of Appeals held:

> Given the coroner's duties and the realities involved in performing those duties, we disagree with Picon that the Legislature literally meant only the person occupying the office of coroner can make the decision to retain parts of the body removed at autopsy. Instead we hold a physician employed by the coroner may make that decision. [Petn. App. 13]

The opinion directly and irrefutably contradicts the plain language of the applicable

statutes, which was an arbitrary, unforeseen act by the judiciary that denied the Petitioner her constitutionally protected rights of due process. Furthermore, when the California Court of Appeals held:

> The problem for Picon, of course, is that while section 27491.4 **might not expressly provide for retention of organs**, section **27491.45** does. That section specifically permits the retention of parts of the body removed at the time of an autopsy to study them. Picon alleges Dr. Benson retained her son's heart because he was intrigued by the rarity of the heart condition he had discovered. In other words, he wanted to study it. There is no hint or suggestion that Dr. Benson retained the heart for some depraved or repugnant purpose. Instead he allegedly sought to satisfy his or a colleague's scientific curiosity regarding the heart condition. **Only if that scientific curiosity** had led to the release of the heart to a third party for noncoroner research purposes would consent from the next of kin have been required. [Petn. App. 14-15] Ironically, the only reason for the distinction between the tissues and organs is relevant here is because defendants insist the sole reason they retained Nicholas Picon's heart was to investigate cause of death. Thus it is the

> defendants themselves who invoke section 27491.4 as authority for the discretion to retain an organ to determine cause of death. [Petn. App. 15]

The court simply ignored the fact that the two statutes authorize the coroner to do two separate and distinctive functions: autopsies versus transplants and scientific research. By combining the two statutes and holding that there is no duty on behalf of the coroner/independent contractor doctor to obtain consent before removing and retaining body parts, the laws have been completely rewritten and, if a person dies in California under conditions that warrant an autopsy, their next of kin no longer have any right to be notified/provide consent if the body parts are removed and retained to determine cause of death, or scientific investigation or coroner training. [Petn. App. 2]

Review is warranted by this Court to reach a decision on the merits of the facts of this case so that widespread abuse and zero accountability does not occur in California or amongst other states that may choose to follow California on the issue of organ retention. Without any procedural requirements in place to safeguard against improper removal and retention of organs, illegal trafficking by independent contractors after autopsy will likely result.

In fact, the ever-increasing worldwide demand for organs highlights the issues of the potential for illegal trafficking and monetary gain of individuals

seeking to exploit this new loophole in the law. A state law that allows for the retention of entire human organs by independent contractors for "scientific purposes" without consent, notification or fear of reprisal beckons widespread abuse. Anything can be construed as being for a "scientific purpose."

Furthermore, now that the judiciary has arbitrarily decided to elevate independent contractors to equivalent status as the coroner, an elected official that has a duty to the public when deciding to retain entire organs, the office of the coroner and the duties that are associated with it have been marginalized without the legislative branch of government making that decision.

By holding that no duty is violated when material facts exist suggesting that the retention of the entire organ went beyond the determination into the cause of death, the applicable statutes have been rendered meaningless and the opinion is arbitrary, unforeseen and deprives the Petitioner the right to vindicate her claims of wrongdoing. Also, by arbitrarily altering the plain meaning of the applicable statutes, the judiciary has placed an undue burden on the Petitioner to vindicate her claims of wrongdoing. The result is that the judgment is not "adequate" as defined by the "adequate and independent" doctrine.

B. The Holding in the Above Referenced Case is Not "Independent"

The issue is that the judgment entered by the California Court of Appeals relied on the dismissal of the Petitioner's Fourteenth Amendment claims by the Federal District Court when rendering its decision. This court has held:

> The "independence" prong focuses on decisions where the state and federal rules are not clearly distinct. If it is not "apparent from the four corners" of the opinion that the judgment rests on an independent state law rule, then, unless it is "necessary or desirable" to obtain clarification from the state court itself, the Supreme Court will presume that the decision rested in part on federal law, thereby rendering it reviewable. *Michigan v. Long*, 463 U.S. 1032, 1040 & n.6. Furthermore, when federal law limits the states' ability to change the definition of state-created legal interests, the Supreme Court has jurisdiction to review the state court's characterization of the law both before and after the change. For example, the U.S. Supreme Court routinely reviews state court determinations of state property law to determine whether a litigant has been deprived of "property" within the meaning of the Due Process clause.

Review is warranted where the California Court of Appeals stated:

> Even if we credit Picon's more plausible factual allegations -- that Dr. Benson retained the heart to study it and that he intended to send it to Stanford University for research -- defendants would still be entitled to judgment in their favor. The law did not impose a duty on defendants to obtain Picon's consent unless and until they acted to send the heart to Stanford University for noncoroner purposes. [Petn. App. 21]

Here, it is evident that the California Court of Appeals referenced the decision reached by the federal court and used it to guide their application of state law to provide the basis for the decision that was reached which deprived the Petitioner Federal Due Process afforded to her by the U.S. Constiution. On July 10, 2008 the Federal Court stated:

> Even Plaintiff's allegation that the Coroner had transferred the heart to Stanford for study does not trigger a notice obligation, as California Government Code section 27491.45(a)(1) authorizes him to "employ or use outside laboratories, hospitals, or research instituions in the conduct of the coroner's scientific investigation or training." [Resp. App. 10a]

Since it is obvious that the California Court of Appeals relied on the federal court's interpretation of California law when it renedered its opinion denying the Petitioner post deprivation Due Process afforded to her under the Fourteenth Amendment of the United States Constitution, this Court has jurisdiction to determine whether the state property law has violated the due process clause. Based on the simple fact that California Government Code Sections 27491.4 and 27491.45 read in their entirety confer a protected property interest to the next of kin for determination of the disposition of the remains of a deceased person at death.

Since the California Court of Appeals based their application of state law on the holding of the federal court and the actual basis for the decision that was reached rested upon federal grounds, this Court is required to reach the merits. This Court held in *Oregon* v. *Kennedy,* 456 U. S. 667, 670-671 (1982):

> [e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits. *Id.*, at 671.

Thus, this court has the jurisdiction to review this case on the merits.

II. THE LEGISLATURES OF THE STATE OF CALIFORNIA CONFERRED A PROPERTY INTEREST TO THE NEXT OF KIN OF ENTITLEMENT TO CONTROL THE DISPOSITION OF THE REMAINS OF A DECEASED PERSON

The issue is whether California law and existing understandings or rules established a protected property interest in the disposition of the remains of deceased persons. The United States Constitution protects rather than creates property interests once conferred.

> In *Gonzalez-De-Blasimi v. Family Dept.* 377 F.3d 81,86 (1st Cir. 2004), with regard to the plaintiff's procedural due process claim, the court noted that under the Fourteenth Amendment the Constitution does not create property interests. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. In order to establish a constitutionally protected property interest, a plaintiff must demonstrate that he or she has a legally recognized expectation that he or she will retain his or her position. *Id.* at 86.

Prior to the precedent setting opinion issued in this case Californians had an expectation that if they or their loved ones died under circumstances that warranted an autopsy and were not as a result of an ongoing criminal investigation they had a quasi-property right to determine the disposition of the remains of their loved ones. This right was established in California in 1899, when the CA Supreme Court held that the duty of the next of kin to bury the deceased required recognition of exclusive rights of possession, control and disposition vesting in those with the duty. *O'Donnell v. Slack* (1899) 123 Cal. 285, 55 P. 906,907.

These rights, it explained, were by law "protected, and for a violation of which [next of kin] are entitled to indemnification." *Id.* One year later, in *Enos v. Snyder* (1900) 131 Cal. 68, 63 P. 170, the California Supreme Court upheld the interests of the next of kin in relation to dead bodies. The California Supreme Court resolved the issue of the possessory right of the body of the deceased for purposes of burial in favor of the next of kin. Most courts addressing the subject have modified the explanation that "there is no property in a dead body." Following *O' Donnell*, California courts commonly use the term "quasi property" to describe the rights of next of kin to the body of the deceased. Violation of the correlative duty of others to refrain from disturbing the body is subject to an action for "tortuous interference with the right to dispose of a decedent's remains." *Sinai Temple v. Kaplan* (1976) 54 Cal.App.

3d 1103; *Christensen v. Superior Court* (1991) 54 Cal.3d 868.

In 1968, the National Conference of Commissioners on Uniform Laws approved the Uniform Anatomical Gift Act (UAGA), adopted by California the same year, which grants next of kin the right to transfer the parts of bodies in their possession to others for medical or research purposes in accordance with Chapter 3.5 (commencing with § 7150) of Part 1 of Division 7 of the California Health & Safety Code. With California's adoption of the 1987 version of the UAGA and California Health and Safety Code § 7150, it statutorily recognized other important rights of the next of kin in relation to the bodies of their deceased loved ones: "the right to transfer body parts and *refuse to allow their transfer*." *Newman v. Sathyavaglswaran* (2002) 287 F. 3d 786.

With the holding in *Huntley v. Zurich General Accident & Liability Insurance Co.* (1929) 100 Cal.App 201, and the 1961 enactment of California Gov Code Section 27491.4, California conferred authorization judicial in nature in the office of the coroner. This authority once conferred created a paramount right to custody, including the right to conduct an autopsy by the coroner in order to determine the cause of death. With the authority came obligations to carry out the duty according to specific procedural safeguards. However, once the coroner completes the autopsy or investigation, the right to control disposition of the remains of a deceased and the duty of interment devolve on the

family of the deceased. *People v. Vick* (1970) 11 Cal.App.3d 1066; Health and Safety Code Section 7100.

The Respondents violated these property rights when the San Mateo County Coroner without authorization allowed the independent contractor to remove and retain entire organs for scientific purposes without the express consent of the next of kin which denied them their legally cognizable right to determine the disposition of the remains of their loved ones.

Therefore, the Petitioner's legally cognizable property right to determine the disposition of the remains of her son for purposes of burial were violated by the Respondent Dr. Benson when he stated:

> Mr. Marriscolo was the chief deputy coroner with whom I had daily contact. And I'm quite sure that I stated to him that it was my wish to send the Picon heart to Stanford University for academic and university workup. *See* Benson Depo. Vol. II, transcript pg. 404 lines 7-11. Separate Statement of Disputed Issues Summary Judgment motions.

Thus, the Fourteenth Amendment Due Process clause was triggered when the Respondents acted to deprive the Petitioner pre and post deprivation due process and this court has jurisdiction to review the facts of this case on the merits.

III. THE SUPREME COURT OF CALIFORNIA ACTED TO FINALLY DEPRIVE THE PETITIONER OF PROPERTY WITHOUT A HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The issue is whether the method of statutory interpretation employed by the California Court of Appeals in its precedent setting opinion provided the Petitioner with procedural due process. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

Here it is evident that the method of statutory interpretation employed by the California Court of Appeals did not provide the Petitioner with the requisite notice to vindicate her claims of wrongdoing. First, the opinion combines two

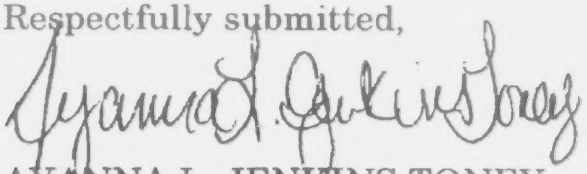
statutes that cannot logically be read together in their entirety, because subdivision b) in both statutes would be invalidated as a result. Secondly, the opinion completely ignores the plain meaning of the statutes and literally rewrites the law. By elevating the independent contractor doctor to the same status as the elected sworn peace officer coroner, the judiciary has overturned the law. Specifically in 1979, the California legislature amended California Government Code Section 27491.4(a) that was originally enacted in 1961. That year, the legislature replaced the word "He" with the words "The Coroner" thus the legislative history makes it abundantly clear that it is a duty of the Coroner to authorize tissue retention at autopsy not the independent contractor doctor. The opinion was arbitrary and unforeseen. Furthermore, the Petitioner was denied *de novo* review of the trial court's pleadings. Essentially, the Petitioner was not granted a meaningful hearing.

As a result, the Respondents have been granted monetary judgments in their favor that trigger yet another deprivation of property without a hearing by the State of California. [Reply Petn. App. 1-2]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



AYANNA L. JENKINS TONEY
Counsel of Record
225 Bush Street, 16th Floor
San Francisco, CA 94104
Tel: (415) 464-4974
Fax: (415) 464-4975
AyannaJ@msn.com

Counsel for Petitioner,
ISOLINA PICON

APPENDIX

Hassard Bonnington LLP
Joseph C. Gharrity, Esq. State Bar No. 117013
Kristen A. Pico, Esq., State Bar No. 186022
Two Embarcadero Center, Suite 1800
San Francisco, CA 94111-3941
Telephone: (415) 288-9800
Fax: (415) 288-9801

Attorneys for Defendant
Peter A. Benson, M.D.

In the Superior Court of the State of California
In and For the County of San Mateo

Isolina Picon, Plaintiff, vs. Peter A. Benson, M.D., County of San Mateo, et al., Defendants.	)	No. CIV 467161 ~~[Proposed]~~ Judgment on Costs in Favor of Defendant Peter A. Benson, M.D. in the Amount of $40,403.88

This Court, having on November 5, 2010, granted defendant Peter A. Benson, M.D.'s Motion for Summary Judgment, and having ordered entry of judgment as rquested in said motion; and

This Court having on November 5, 2010, ordered that defendant Peter A. Benson, M.D. have and

recover from plaintiff Isolina Picon costs and disbursements incurred in the defense of this action pursuant to Code of Civil Procedure §§1032 and 1033.5; and

Defendant Peter A. Benson, M.D., having on November 29, 2010 filed and served his Memorandum of Costs in the amount of $38,725.60 and his Memorandum of Costs on Appeal in the amount of $1,678.28; and

Plaintiff Isolina Picon having not filed or served a motion to tax within the time allotted by California Rules of Court, Rule 3.1700(b)(1);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Peter A. Benson, M.D. is hereby awarded his recoverable costs in the amount of $40,403.88.

Dated: Apr 5, 2011

John L. Grandsaert
Judge of the
Superior Court